IN THE

# Supreme Court of the United States

October Term, 1960

No. 5

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ETC.,

*Petitioner,*

*v.*

A. S. HARRISON, JR., Attorney General of Virginia, et al.

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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## Constitution Cited

## Statutes, Texts and Miscellaneous Citations

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia entered on September 2, 1960, in the above-entitled cause.

### Opinion Below

The opinion of the court below is reported at 202 Va. 142, 116 S. E. 2d 55, and is appended hereto, *infra* at page 1a.

### Jurisdiction

The judgment of the Supreme Court of Appeals of Virginia, appended hereto, *infra* at page 29a, was entered on September 2, 1960. An order was entered on October 12, 1960, denying petition for rehearing and is appended hereto, *infra* at page 29a.

Application for an extension of time to and until January 31, 1961, in which to file this petition was granted by Mr. Justice Frankfurter in an order dated January 3, 1961.

Jurisdiction of this Court to review the judgment below is invoked under Title 28, United States Code, § 1257(3).

## Statute Involved

Chapter 33

ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA

Extra Session, 1956

(Sections 54-74, 54-78 and 54-79 of the Code of Virginia as amended)

*An Act to amend and reenact §§ 54-74, 54-78 and 54-79 of the Code of Virginia, relating, respectively, to procedure for suspension and revocation of licenses of attorneys at law, and to running and capping.*

Approved September 29, 1956

Be it enacted by the General Assembly of Virginia:

1. That §§ 54-74, 54-78 and 54-79 of the Code of Virginia be amended and reenacted as follows:

§ 54-74. (1) Issuance of rule.—If the Supreme Court of Appeals or any court of record of this State, observes, or if complaint, verified by affidavit, be made by any person to such court of any malpractice or of any unlawful or dishonest or unworthy or corrupt or unprofessional conduct on the part of any attorney, or that any person practicing law is not duly licensed to practice in this State, such court shall, if it deems the case a proper one for such action, issue a rule against such attorney or other person to show cause why his license to practice shall not be revoked or suspended.

(2) Judges hearing case.—At the time such rule is issued the court issuing the same shall certify the fact of such issuance and the time and place of the hearing thereon, to the chief justice of the Supreme Court of Appeals, who shall designate two judges, other than the judge of the court issuing the rule, of circuit courts or courts of record of cities of the first class to hear and decide the case in conjunction with the judge issuing the rule; which such two judges shall receive as compensation ten dollars per day and necessary expenses while actually engaged in the performance of their duties, to be paid out of the treasury of the county or city in which such court is held.

(3) Duty of Commonwealth's attorney.—It shall be the duty of the attorney for the Commonwealth for the country or city in which such case is pending to appear at the hearing and prosecute the case.

(4) Action of court.—Upon the hearing, if the defendant be found guilty by the court, his license to practice law in this State shall be revoked, or suspended for such time as the court may prescribe; provided, that the court, in lieu of revocation or suspension, may, in its discretion, reprimand such attorney.

(5) Appeal.—The person or persons making the complaint or the defendant, may, as of right, appeal from the judgment of the Court to the Supreme Court of Appeals by petition based upon a true transcript of the record, which shall be made up and certified as in actions at law.

(6) "Any malpractice, or any unlawful or dishonest or unworthy or corrupt or unprofessional conduct", as used in this section, shall be construed to include the improper solicitation of any legal or professional business or employment, either directly or indirectly, *or the acceptance of employment, retainer, compensation or costs from any person, partnership, corporation, organization or association*

*with knowledge that such person, partnership, corporation, organization or association has violated any provision of Article 7 of this chapter,* or the failure, without sufficient cause, within a reasonable time after demand, of any attorney at law, to pay over and deliver to the person entitled thereto, any money, security or other property, which has come into his hands as such attorney; *provided, however, that nothing contained in this Article shall be construed to in any way prohibit any attorney from accepting employment to defend any person, partnership, corporation, organization or association accused of violating the provisions of Article 7 of this chapter.*

(7) Representation by counsel.—In any proceedings to revoke or suspend the license of an attorney under this or the preceding section, the defendant shall be entitled to representation by counsel.

§ 54-78. As used in this article:

(1) A "runner" or "capper" is any person, corporation, partnership or association acting in any manner or in any capacity as an agent for an attorney at law within this State *or for any person, partnership, corporation, organization or association which employs, retains or compensates any attorney at law in connection with any judicial proceeding in which such person, partnership, corporation, organization or association is not a party and in which it has no pecuniary right or liability,* in the solicitation or procurement of business for such attorney at law *or for such person, partnership, corporation, organization or association in connection with any judicial proceedings for which such attorney or such person, partnership, corporation, organization or association is employed, retained or* compensated.

*The fact that any person, partnership, corporation, organization or association is a party to any judicial proceeding shall not authorize any runner or capper to solicit*

*or procure business for such person, partnership, corporation, organization or association, or any attorney at law employed, retained or compensated by such person, partnership, corporation, organization or association.*

(2) An "agent" is one who represents another in dealing with a third person or persons.

§ 54-79. It shall be unlawful for any person, corporation, partnership or association to act as a runner or capper, *as defined in* § 54-78 to solicit any business for *an attorney at law or such person, partnership, corporation, organization or association,* in and about the State prisons, county jails, city jails, city prisons, or other places of detention of persons, city receiving hospitals, city and county receiving hospitals, county hospitals, police courts, *county* courts, municipal courts, courts of *record,* or in any public institution or in any place or upon any public street or highway or in and about private hospitals, sanitariums or in and about any private institution or upon private property of any character whatsoever.

2. An emergency exists and this act is in force from its passage.

## Statement

Petitioner is a nonprofit membership corporation, incorporated under the laws of the State of New York (F. 45, 165, 496-502).[1] It is licensed to do business in Virginia as a foreign corporation (F. 191).

[1] There are two transcripts which make up the record in this case: (1) The printed record used in connection with the appeal in N.A.A.C.P. v. Harrison, No. 127, Oct. Term, 1958, 360 U. S. 167—the citations to that record will be identified by the prefix "F"; (2) the printed record of additional testimony taken in the Circuit Court of the City of Richmond, when suit was there instituted for an authoritative state construction and interpretation of the legislation at issue in this petition—references to this record will be identified by the prefix "S".

Petitioner's activities in Virginia are carried on through some 89 chartered branches scattered throughout the state. These branches are grouped together into an unincorporated association called the Virginia State Conference of Branches which acts on matters of statewide concern (F. 46, 134-135, 136). Its basic aims and purposes are to improve the status of Negroes in American life,[2] and through the national organization, the Virginia State Conference of Branches, local branches and members, petitioner seeks full citizenship rights for all persons in Virginia without debilitation based upon race.

In its effort to achieve this overall objective, petitioner encourages Negroes to assert their constitutional rights and in some instances, assists those who institute litigation that seeks vindication of the guarantees against racial and color differentiations contained in the Fourteenth and Fifteenth Amendments to the Constitution of the United States (F. 170, 171). While petitioner, of course, attempts to achieve its aims in other ways as well (F. 171, 172), the issues raised in this case relate solely to its involvement in litigation in which Negroes resort to the courts in an effort to free themselves and the country of the burdens of racial discrimination.

The Virginia State Conference has a legal committee presently composed of 15 lawyers (S. 93)[1] residing in different parts of the state. This committee, more commonly known as the legal staff, is elected at each annual state convention, and it in turn elects a chairman (F. 48, 157; S. 102-104).

The petitioner organization becomes involved in litigation when an aggrieved person contacts either a member

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[2] The Court has had occasion to examine the aims, purposes and organizational structure of the petitioner organization. See N.A.A.C.P. v. Alabama, 357 U. S. 449; Bates v. Little Rock, 361 U. S. 516. Hence, no detailed explanatory statement in that regard is being set forth in this petition.

of the legal staff in person or the Executive Secretary of the Virginia State Conference of Branches, who then refers the complaining party to the Chairman or to some other member of the legal staff, if the situation appears to be a genuine grievance concerning state-imposed racial discrimination (F. 48, 147-150, 207, 563, 567). The Chairman either confers with the complaining party or is apprised of the facts by a member of the legal staff. If he concludes that the situation is one with which the organization should concern itself, he recommends that the State Conference assume the financial obligations involved in prosecuting the matter in the courts (F. 48, 150, 209, 210). This recommendation is communicated to the President of the State Conference and upon the latter's concurrence the Conference obligates itself to underwrite the expenses of the litigation (F. 48, 150). In most instances the lawyer handling the litigation is a member of the legal staff (F. 152, 153, 159), and there is no complaint in the record from any litigant in this regard. Once the Conference undertakes to underwrite the cost of the litigation, it does not pay any monies to the complaining party. The funds go to the attorney representing the litigant for out-of-pocket expenses incurred, plus a fixed per diem for time spent in the preparation and trial of the cause (F. 48, 209-210, 646-647). The compensation received by the lawyers is well below that which they would normally feel entitled to demand (F. 321, 325, 329).

Petitioner's policy against discrimination is well known, and the public is aware of the fact that it will underwrite the costs of prosecuting in the courts a legitimate complaint involving discrimination which it believes to be unlawful (S. 113).

Petitioner is not a legal aid society. It does not give assistance to Negroes merely because they are Negroes or because they are indigent, and membership in the organization is not essential for aid to be forthcoming. Petitioner concerns itself solely with the validity of racial discrimination

where resolution of the question involved may affect Negroes in general (S. 121). For the past several years—since 1950 at least—it has refused to finance litigation involving racial discrimination unless the court action was aimed at contesting the legality of racial segregation *per se* (S. 113, 125). It does not act until some individual comes asking for help (F. 144), and if there is a change of heart and the individual wishes to withdraw prior or subsequent to the commencement of the law suit, there is never any problem of his being able to do so (F. 232; S. 80, 131).

Chapter 33, along with Chapters 31, 32, 35 and 36, was passed as a package at the 1956 Extra Session of the General Assembly of Virginia. These statutes were part of Virginia's "massive resistance" plan to implementation of this Court's decision in *Brown* v. *Board of Education*, 347 U. S. 483. The chronology of events, from the appointment of the Gray Commission on Public Education, which was empowered to recommend ways and means for dealing with the *Brown* decision, to the 1956 Extra Session of the General Assembly, called to enact legislation to preserve segregated schools and at which Chapter 33 became law, is set out in the opinion of Judge Soper in *N.A.A.C.P.* v. *Patty*, 159 F. Supp. 503 (E. D. Va. 1959), appended hereto *infra*, pages 30a, 40a-47a, and will not need repetition here.

In the belief that Chapters 31, 32, 33, 35 and 36 were enacted to destroy the organization and that the laws denied due process, equal protection of the laws, freedom of speech and association to petitioner and all those connected with it in seeking the development and implementation of constitutional doctrine outlawing racial discrimination, petitioner brought suit in a specially-constituted statutory United States District Court for the Eastern District of Virginia attacking the constitutionality of all of these statutes and seeking to enjoin their enforcement (See *N.A.A.C.P.* v. *Patty*, *supra*). That court, on January 21, 1958, struck down Chapters 31, 32 and 35. It found Chapters 33 and 36, however, too ambiguous for construc-

tion by the federal court prior to an authoritative construction and interpretation by the state courts, and as to these latter statutes, petitioner was instructed to institute proceedings in the state courts.[3]

The instant proceedings were instituted in the Circuit Court of the City of Richmond seeking a judgment declaratory of the construction and interpretation of Chapters 33 and 36 to the effect that the activities of petitioner, its affiliates, officers, members, contributors and voluntary workers, in encouraging Negroes to assert their constitutional rights and in expending monies to defray the cost of litigation designed to eliminate state-imposed racial segregation; the practice of litigants, in accepting such aid in cases aimed at the establishment of legal and constitutional standards of equal justice without regard to race or color; and the activities of attorneys, in representing such litigants when the fees and expenses are paid by petitioner, were lawful and not in violation of Chapters 33 and 36. In addition, petitioner alleged that if Chapters 33 and 36, as construed, rendered these aforesaid activities unlawful, that Chapters 33 and 36 were unconstitutional and void, being in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and their enforcement against petitioner, and those associated with it should be permanently enjoined.

The case was tried in the Circuit Court on the record and exhibits used in connection with the appeal in

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[3] Subsequently, sub nom N.A.A.C.P. v. Harrison, 360 U. S. 167, the judgment of the federal court in respect to Chapters 31, 32 and 35 was vacated upon the grounds that the doctrine of federal abstention required the federal court to withhold a decision on the merits in respect to these statutes until they had been given an authoritative interpretation by the state courts. Such proceedings are now pending in the Circuit Court of the City of Richmond. The outcome of those proceedings will undoubtedly be affected by this determination.

*N.A.A.C.P. v. Harrison*, 360 U. S. 167, the bill of complaint filed by petitioner, respondent's answer and additional testimony and exhibits adduced at the trial in the Circuit Court of the City of Richmond.

That court construed Chapters 33 and 36 as proscribing petitioner's giving assistance to persons in litigation involving racial discrimination and found no inconsistency between the statutes as thus construed and the constitutional guarantees of equal protection and due process.

On appeal to the Supreme Court of Appeals of Virginia, Chapter 36 was held to be fatally defective, in that it was violative of the Fourteenth Amendment to the Constitution of the United States. Chapter 33, however, was found to be a proper regulation of the legal profession and a valid prohibition of the activities of the petitioner which were held to constitute the unlawful solicitation of legal business. The Supreme Court of Appeals concluded that Chapter 33 prohibited petitioner's giving assistance to litigants to vindicate their constitutional rights to freedom from racial discrimination, by referring complaints brought by such persons to attorneys associated with petitioner and by paying to the attorneys whatever fees and expenses such litigation involved.

Application for rehearing was denied and petitioner brings the cause here.

## Question Presented

Whether a state, under the guise of regulating the practice of law, may make criminal the activities of petitioner and its affiliates, in defraying the costs and expenses of litigation instituted by Negroes who seek to vindicate their constitutional right to be free of racial discrimination, where these activities are not undertaken to promote any private or commercial interests, and may subject attorneys acting as counsel in such litigation to disbarment or other

disciplinary proceedings, without violating the Fourteenth Amendment mandates of due process and equal protection of the laws and without abridging the Constitution's guarantee of free access to the courts.

## Reasons for Allowance of the Writ

1. This Court's consistent practice of making its own independent evaluation of the evidentiary facts upon which a lower court's adjudication of constitutional claims is based compels the granting of this petition. See, *Blackburn* v. *Alabama*, 361 U. S. 199; *Spano* v. *New York*, 360 U. S. 345; *Napue* v. *Illinois*, 360 U. S. 264; *Muir* v. *Louisville Park Theatrical Association*, 102 F. Supp. 525 (W. D. Ky. 1951), aff'd, 202 F. 2d 275 (6th Cir. 1953), vacated and remanded, 344 U. S. 971; *Niemotko* v. *Maryland*, 340 U. S. 268, 271; *Feiner* v. *New York*, 340 U. S. 315, 316, 322, fn. 4; *Watts* v. *Indiana*, 338 U. S. 49, 50-51; *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659; *Pierre* v. *Louisiana*, 306 U. S. 354, 358; *Baltimore & Ohio Railroad Company* v. *United States*, 298 U. S. 349, 372; *St. Joseph Stock Yards Company* v. *United States*, 298 U. S. 38, 49-55; *Norris* v. *Alabama*, 294 U. S. 587, 589, 590; *Ohio Valley Water Company* v. *Ben Avon Borough*, 253 U. S. 287. Cf. *Ng Fung Ho* v. *White*, 259 U. S. 276, 284, 285. And see Jaffe, "Judicial Review: Constitutional and Jurisdiction Fact," 70 *Harv. L. Rev.* 953 (1957). Indeed, this case is strikingly illustrative of the wisdom of the Court's refusal to foreclose reappraisal of a finding that is essential to determination of a constitutional question.

Here, the state and federal courts, on virtually the same evidence, reached irreconcilable conclusions as to what facts the record discloses. The Supreme Court of Appeals reads the evidence as showing that petitioner is "engaged in fomenting and soliciting legal business" in which it is not a party and has "no pecuniary right or liability," and which it channels "to the enrichment of certain lawyers employed" by it, "at no cost to the litigants and over

which the litigants have no control" (See Appendix A, *infra* at p. 15a). It found no merit in petitioner's argument that its activities are not "what are commonly considered as solicitation of business contrary to the canons of legal ethics" (*id.* at p. 16a). It concluded that the petitioner and its affiliates act as intermediaries between the client and the lawyer in the solicitation of legal business and, therefore, that acceptance of employment by attorneys of cases handled under petitioner's auspices violate Canons 35 and 47 of the Canons of Professional Ethics in force in Virginia since October 21, 1938, 178 Va. p. XXXII (*id.* at 17a). The court stated that Chapter 33 was designed to and could appropriately curb the kind of activities in which petitioner is engaged and, held that in regulating and restricting petitioner's actions, the statute does not violate constitutional guarantees of freedom of speech or association, due process or equal protection of the laws.

The federal court, on the other hand, found that the activities of petitioner did not "amount to a solicitation of business or a stirring up of litigation of the sort condemned by the ethical standards of the legal profession" (See Appendix B, *infra* at p. 81a). Moreover, it found petitioner's activities authorized by Canon 35 of the Canons of Professional Ethics of the American Bar Association (*id.* at p. 79a). While finding Chapter 33 obscure and difficult to understand, the court concluded "the general purpose seems to be to hit any organization which participates in a law suit in which it has no financial interest and also to fasten the charge of mal-practice upon any lawyer who accepts employment from such an organization. If the statute should be so interpreted as to forbid a continuance of the activities of [petitioner] in respect to litigation as described in this opinion, it would in large measure destroy [its] effectiveness." (*id.* at p. 83a).

That the state and federal courts reached disparate determinations as to petitioner's constitutional claims was

the inevitable consequence of the division between them as to what the evidentiary facts disclosed. Pursuant to the principle enunciated in the cases hereinabove cited, it is respectfully submitted that this petition should be granted. Then, this Court, after an independent evaluation of all the evidentiary facts contained in this record, may determine for itself whether there is merit to petitioner's contention that Chapter 33, as applied to its activities, infringes rights of freedom of speech and of association, denies due process and equal protection of the laws and constitutes an effective barrier to free access to the courts raised against those seeking relief from racial discrimination imposed by state officials.

2. In characterizing petitioner's activities as the solicitation of legal business under the terms of Chapter 33, the court below gave a construction and interpretation to the statute which renders it arbitrary and unreasonable within the meaning of applicable decisions of this Court. See *Konigsberg* v. *State Bar of California*, 353 U. S. 252; *Schware* v. *State Bar Examiners*, 353 U. S. 232; *Morey* v. *Doud*, 354 U. S. 457; *Williamson* v. *Lee Optical of Oklahoma*, 348 U. S. 483. Maintenance of the integrity of the legal profession is, of course, a matter of appropriate concern for the state legislature. In dealing with Chapter 33, however, as it relates to petitioner's activities, it should be recognized, petitioner submits, that far more than that abstract question is present.

The petitioner organization, since its inception, has been engaged in an effort to secure equal civil rights for Negroes within the democratic process. Prevailing political, social and economic forces have offered little prospect of legislative or executive action to correct the inequities of second-class citizenship. But complaint in respect to the validity of caste and color differentiations lends itself to adjudication in the courts, since what is involved is a determination of the meaning and scope of the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States.

Petitioner has sought the establishment in the fundamental law of such yardsticks as would outlaw the evil of racial discrimination. Pursuant to this end petitioner supports test cases aimed chiefly at determining the reach and scope of due process, equal protection and constitutional guarantees against disenfranchisement. Some of these cases reached this Court, *e.g.*, *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337; *Smith* v. *Allwright*, 321 U. S. 649; *Sweatt* v. *Painter*, 339 U. S. 629; *Brown* v. *Board of Education*, 347 U. S. 483. That petitioner has made possible the preparation and research necessary for presentation of the constitutional issues involved in the above and other litigation concerning the validity of some aspect of racial discrimination; that it has paid the legal fees and expenses; and that attorneys associated with it were counsel in such cases has been no secret. See Note, 58 Yale L. J. 574 (1949). The high cost of litigation makes sponsorship of this kind of litigation by the individual Negro an impossibility.[4] Petitioner does not concern itself with business or private interests of individuals. It involves itself in litigation relating solely to civil rights, and then only where the question being litigated is likely to have an impact upon the Negro community as a whole. Of course, in a larger sense the issues determined in litigation sponsored by petitioner affect the whole American public. The lawyers involved, while receiving some financial remuneration, do not obtain anything close to what would be considered an adequate fee for legal services.[5] Petitioner's activities and those of the lawyers come within that category which the courts and bar associations have given unqualified approval. See *e.g.*, *In re Ades*, 6 F. Supp. 467 (D. C. Md. 1934); *Gunnels* v. *Atlantic Bar Assn.*, 191 Ga. 366, 12 S. E. 2d 602 (Ga. 1940); Opinion No. 148, A. B. A. Opinions of the Committee on Professional Ethics and Grievances 308 (1935); Opinion 282, *id.*, at page 591 (1950); Note, 3 R. R. L. R. 1257.

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[4] See letter of Gordon M. Tiffany, Staff Director of the United States Commission on Civil Rights to Senator Jacob K. Javits, 106 Cong. Rec. (No. 35) 3376-3377 (Feb. 27, 1960).

[5] See Tiffany, *op. cit. supra*, note 4.

Certainly the kinds and types of litigation with which petitioner is connected make it highly improbable that its activities are of that class that gives the bench and bar concern about the maintenance of the integrity of the legal profession. Indeed, little interest was manifested in petitioner's support of litigation until some states began to seek a means to avoid adhering to *Brown*. See Note, 3 R. R. L. Rep. 1257 (1958). Since implementation of any doctrine of constitutional law, unless voluntarily adhered to by state officials, requires the institution and prosecution of court litigation, it soon became evident that the state policy of segregation might be preserved for a while, at least, if petitioner was prevented from supporting litigation to invalidate segregation.

Viewed realistically, therefore, there is no escape from the conclusion that Virginia sought by this statute to undergird its plan of "massive resistance" to the implementation of the *Brown* decision. With decisions in *Cooper* v. *Aaron*, 358 U. S. 1; *Harrison* v. *Day*, 106 S. E. (2d) 636; *James* v. *Almond*, 170 F. Supp. 331 (E. D. Va. 1959), appeal dismissed, 359 U. S. 1006, "massive resistance" proved to be a bankrupt policy, and it was abandoned. Resistance to full implementation of constitutional proscriptions against racial segregation, however, is still a potent force in the state today.

Whatever the intent and purpose of Chapter 33, as now construed and applied its effect is to immobilize petitioner organization and greatly handicap the effort to secure implementation of the *Brown* decision in Virginia. On the other hand, all the state's resources are being used to maintain the prevailing pattern of segregation, thereby preventing many residents and citizens of Virginia from enjoyment of their declared constitutional rights.

In the light of these circumstances, the construction and application of Chapter 33 enunciated below is not reasonably

related to a valid governmental objection, and the statute, therefore, is fatally defective. Cf. *Shelton* v. *Tucker*, — U. S. —, 29 L. W. 4058, decided December 12, 1960.

3. As construed, Chapter 33 cannot be squared with the decisions of this Court in *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, and *Bates* v. *Little Rock*, 361 U. S. 516. The court below states that petitioner and its associates "may not be prohibited from acquainting persons with what they believe to be their rights and advising them to assert their rights, in so doing it is prohibited from soliciting legal business for their attorneys or any particular attorneys." Moreover, the court below held that petitioner's activities constituted solicitation. Thus, the asserted protection of freedom of speech and association guarantees becomes empty cant. The court holds that petitioner and its members cannot engage in the activities revealed in this record. No attorney on the petitioner's State Conference legal staff can safely act as counsel in any litigation in which petitioner has acquainted persons with their rights, advised them to assert same or contributed money for prosecution of the law suit, without being prospectively guilty of violating this statute. No other attorneys can act in such cases since they are subject to being the "particular attorneys" for whom petitioner has engaged in solicitation of legal business. The short of it is that petitioner must forego any activity relating to litigation to avoid the pinch of Chapter 33. Since this has been the area of petitioner's greatest effectiveness, Chapter 33, therefore, as now construed means a serious weakening, if not destruction, of petitioner organization in Virginia. As such, it is submitted, the rights of petitioner's members to freedom of association and to take lawful action to secure the lawful objective of equal citizenship privileges for all persons without regard to their race have been seriously impaired. See *N.A.A.C.P.* v. *Alabama*, *supra*; *Bates* v. *Little Rock*, *supra*; Cf. *Talley* v. *California*, 362 U. S. 60.

4. The decision below seriously restricts group sponsorship of test litigation, designed for ultimate determination by this Court, in which serious and legitimate claims are made concerning the constitutional validity of a federal or state statute, action or regulation which poses a threat to some group interest. As such the questions raised should be settled by this Court since this is a case of first impression having far reaching consequences of national import and affecting a myriad variety of federal rights. Cf. *Raley* v. *Ohio*, 360 U. S. 423.

Group sponsorship of litigation has been an accepted practice in the United States, for many years. Labor unions,[6] trade associations,[7] consumers organizations,[8] nationality groups,[9], bar associations,[10] *ad hoc* committees,[11]

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[6] See reprint of testimony of Walter Drew before Senate Judiciary Committee (1914) in, "The Crime of the Century and Its Relation to Politics," p. 24 (Nat'l. Assn. of Manufacturers publication): News You Don't Get, August 11, 1936, April 27 and May 5, 1938 (published by National Committee for the Defense of Political Prisoners) pages unnumbered; Church, S. H., "Trade Unionism and Crime." New York Times, Oct. 1, 1922.

[7] E.g., The National Erector's Association retained Walter Drew to represent it in litigation. See reprint referred to in note 6 *supra*. Counsel cannot document the fact that trade associations have given support to litigation which seeks to determine the validity of laws affecting business interests since such information is not contained in the case reports. However, it would be a fair assumption that such support does take place, especially since Bar Association holdings have condoned litigation of this character. See Opinion 148, Committee on Professional Ethics and Grievances, A.B.A. (1935).

[8] The Consumers League sponsored litigation involving the constitutionality of social welfare legislation in the 1930's. Schlesinger A. M., Crisis of the Old Order (1957) pp. 113 and 419.

[9] Between 1856 and 1875 the German Society provided a special legal committee to protect newly arrived immigrants. Smith, R. H., Justice and the Poor (1921) p. 134. American Committee for the Defense of Puerto Rican Political Prisoners. News You Don't Get, op. cit. supra, note 6.

[10] Gunnels v. Atlanta Bar Association, 191 Ga. 366, 12 S. E. (2d) 602 (1940).

[11] E.g., See Schlesinger, A. M., op. cit. supra, note 8 at page 113; Scottsboro Defense Committee, Binche, R.; "Programs, Ideologies and Tacits and Achievements of Negro Betterment and Inter-Racial Organizations," manuscript prepared for the Carnegie Foundation Study by Gunnar Mydral of the Negro in America (1940).

racial groups,[12] religious groups,[13] labor defense committees,[14] child welfare organizations,[15] civil liberties groups,[16] property owners,[17] tenants,[18] professional group,[19] and committees for protection of immigrants[20] have sponsored litigation involving some legal question affecting the interests of the group concerned. In the field of constitutional law where adjudication of a case or controversy is a prerequisite to judicial determination of whether governmental action is constitutionally permissible, the test case is a recognized method of raising constitutional claims. See *Stark* v. *Wickard*, 321 U. S. 288, 310; *Evers* v. *Dwyer*, 358 U. S. 202.

The right of individual or groups to sponsor litigation where there is no agreement to share the proceeds and where the members of the group have a common or general or patriotic interest in the principle of law to be estab-

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[12] See New York Times article, Champion of Indians, March 3, 1958; Note, 58 Yale L. J., supra.

[13] E.g., Johovah's Witnesses apparently sponsored a number of cases in the United States Supreme Court, e.g., Marsh v. Alabama, 326 U. S. 501, and Cantwell v. Connecticut, 310 U. S. 296. The Methodist Federation for Social Service provided financial assistance in the Scottsboro Case. News You Don't Get, Jan. 3, 1936, pages unnumbered.

[14] E.g., *See*, In Re Ades, 6 F. Supp. 467 (D. Md. 1934).

[15] E.g., The Children's Aid Society of Boston, Smith, R. H., Justice and the Poor, op. cit. supra, note 7 at page 223 (1921), p. 223.

[16] E.g., The American Civil Liberties Union.

[17] Opinions of the Committees on Professional Ethics of the Association of the Bar of the City of New York and the New York County Lawyer's Association, Columbia Univ. Press, 1956, Op. No. 113; Hurd v. Hodge, 334 U. S. 24.

[18] Shanks Village Committee Against Rent Increases v. Cary, 103 F. Supp. 566 (S. D. N. Y. 1952).

[19] E.g., Shelton v. Tucker, — U. S. —, 29 L. W. 4058, decided Dec. 12, 1960.

[20] E.g., American Committee for the Protection of the Foreign Born assisted Otto Richter, a German refugee seeking political asylum. News You Don't Get, Feb. 25, 1935, pages unnumbered.

lished has been sanctioned by court decisions. See *Brannon v. Stark*, 185 F. 2d 871 (D. C. Cir. 1950), aff'd 342 U. S. 451; *Gunnels v. Atlanta Bar Assn.*, 191 Ga. 366, 12 S. E. 2d 602 (1940); *Brush v. Carbondale*, 299 Ill. 144, 82 N. E. 252 (1907); *Davies v. Stowell*, 78 Wis. 334, 47 N. W. 370; *Royal Oak Drain. Dist. v. Keefe*, 87 F. 2d 786 (6th Cir. 1937); *Vitaphone Corp. v. Hutchison Amusement Co.*, 28 F. Supp. 526 (D. Mass. 1939); *In re Ades*, 6 F. Supp. 467 (D. Md. 1934).

This decision below, therefore, not only affects petitioner's interests and those associated with it, but is adverse to the sponsorship of litigation by any group. This raises serious questions relating to the individual's right and opportunity to subject governmental action to measurements against the requirements of the Constitution of the United States. It seriously hampers the individual in exercise of his right of access to the courts, see *Terral v. Burke Construction Co.*, 257 U. S. 529; *Truax v. Corrigan*, 257 U. S. 312, 334; *Barbier v. Connelly*, 113 U. S. 27, 31, and raises grave questions in respect to state authority to delimit the prosecution of federal rights in the federal courts. Cf. *Theard v. United States*, 354 U. S. 278; *In re Crow*, 359 U. S. 1007.

Barratry, maintenance and champerty were the great evils of a bygone era. See Radin, "Maintenance by Champerty," 24 *Calif. L. Rev.* 48 (1935); Note, 3 R. R. L. Rep. 1257 (1958). Today the court and the bar seek to guard against commercialization of the law and the reduction of the profession from a high and noble priesthood to a competitive business enterprise with a resultant lowering of ethical standards. The high cost of legal services, and its unavailability to lower and middle-income groups, see "Judicial Administration and the Common Man," 287 *Annals* pp. 34-41, 43-52, 110-119, 120-126 (1953), and the time-consuming factor in litigation, see "Lagging Justice," 328 *Annals*, passim (1960), have been the chief concerns in modern day administration of justice.

At best, the state's power to deal with the evils of barratry must compete with the public interest in keeping the

pathway to the courts unimpeded. In attempting to accommodate these two competing claims, suppression of fundamental personal freedom must be avoided.

Whether, therefore, an organization, such as that now before the Court, in seeking the adjudication and settlement of constitutional questions which affect the lives, hopes and aspirations of a sizeable segment of the nation's population, is engaged in unlawful activities in furnishing the means for prosecution of litigation testing the validity of racial discrimination, is a question of paramount importance which should be determined by this Court.

## CONCLUSION

**Wherefore, for the reasons hereinabove stated, it is respectfully submitted that this petition should be granted.**

Respectfully submitted,

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# APPENDIX A

**(Opinion of the Supreme Court of Appeals of Virginia)**

Present: All the Justices

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Record No. 5096

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ETC.

—v.—

A. S. HARRISON, JR., Attorney General of Virginia, et al.

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Record No. 5097

N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

—v.—

A. S. HARRISON, JR., Attorney General of Virginia, et al.

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OPINION BY JUSTICE LAWRENCE W. I'ANSON

Staunton, Virginia, September 2, 1960

FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND

EDMUND W. HENING, JR., *Judge*:

The National Association for the Advancement of Colored People, hereinafter referred to as the NAACP, and the NAACP Legal Defense and Educational Fund, Inc., hereinafter referred to as the Fund, appellants herein, filed their separate bills of complaint in the court below against Albertis S. Harrison, Jr., Attorney General of the Commonwealth of Virginia, the attorneys for the Commonwealth of

the cities of Richmond, Newport News and Norfolk, and the counties of Arlington and Prince Edward, Virginia, appellees herein, to secure a declaratory judgment construing chapters 33 and 36, Acts of Assembly, Ex. Sess., 1956, codified as §§ 54-74, 54-78, 54-79, Code of 1950, as amended, 1958 Replacement Volume, and §§ 18-349.31 to 18-349.37,[1] inclusive, Code of 1950, as amended, 1958 Cum. Supp., as they may affect the appellants, their officers, members, affiliates of NAACP, contributors, voluntary workers, attorneys retained or employed by them or to whom they may contribute monies and expenses, and litigants receiving assistance in cases involving racial discrimination, because of the activities of the NAACP and the Fund in the past or the continuation of like activities in the future.

The NAACP, in addition to seeking a construction of the aforementioned statutes, alleged that the statutes are unconstitutional and void because their enforcement would deny to it, its affiliates, officers, members, contributors, voluntary workers, attorneys retained or employed by it, and litigants whom it may aid, due process of law and equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

The two suits were heard and considered together in the court below, by consent of all parties, on the appellants' bills; their exhibits, which included a transcript of the evidence, exhibits, the majority and dissenting opinions of the three-judge federal court, and the judgment entered in the case of *National Association for the Advancement of Colored People* v. *Patty*, 159 F. Supp. 503 (judgment vacated and remanded *sub nom. Harrison, et al.* v. *National Association for the Advancement of Colored People*, 360 U. S. 167, 79 S. Ct. 1025, 3 L. ed. 2d 1152); the answers and exhibits of the appellees; and *ore tenus* testimony on behalf of the appellees and the NAACP, except one deposition taken on behalf of the NAACP. No testimony was taken on behalf of the Fund.

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[1] Now §§ 18.1-394 to 18.1-400, 1960 Cum. Supp.

The court below held, so far as need here be stated, (1) that chapters 33 and 36 do not violate the constitutional guarantees of freedom of speech and assembly, due process of law and equal protection of the laws under the Fourteenth Amendment; (2) that the evidence shows that the appellants, their officers, affiliates, members, voluntary workers and attorneys are engaged in the improper solicitation of legal business and employment in violation of chapter 33 and the canons of legal ethics; (3) that attorneys who accept employment by appellants to represent litigants in cases solicited by the appellants, and in which they pay all costs and attorneys' fees, are violating chapter 33 and the canons of legal ethics; and (4) that the appellants and those associated with them advise persons of their legal rights in matters in which the appellants have no direct interest, and whose professional advice has not been sought in accordance with the Virginia canons of legal ethics, and as an inducement for such persons to assert their legal rights through the commencement of or further prosecution of legal proceedings against the Commonwealth of Virginia, any department, agency or political subdivision thereof, or any person acting as an employee for either or both or any of the foregoing, the appellants furnish attorneys employed by them and pay all court costs incident thereto, and that these activities violate either chapter 33 or 36, or both.

The court's decree enumerated certain detailed activities of the appellants which do not violate chapters 33 and 36, and since they are not challenged by any of the parties hereto, they need not be stated herein.

From the decree of the chancellor we granted an appeal and *supersedeas* in each cause. They will be considered together by us, as they were in the court below, except the statutes involved will be considered separately.

The questions presented on these appeals are:

(1) Do the activities of the appellants, or either of them, amount to solicitation of business, prohibited by chapter 33?

(2) Do the activities of the appellants, or either of them, amount to an inducement to others to commence or further prosecute lawsuits against the Commonwealth, its officers, agencies, or political subdivisions, as prohibited by chapter 36?

(3) Do the provisions of either chapters 33 or 36 violate the Virginia Bill of Rights (Constitution § 12) and the Fourteenth Amendment to the Constitution of the United States?

The evidence shows that the NAACP and the Fund are non-profit membership corporations organized under the laws of the State of New York with authority to operate in this Commonwealth as foreign corporations. The NAACP and the Fund functioned as one corporation with the same officers, directors and members from 1911 until 1948, when, for tax purposes and other reasons, the Fund was organized as a separate corporation.

The principal purpose of the NAACP is to eliminate all forms of racial segregation. It has been described by its counsel as a political organization for those who oppose racial discrimination.

Affiliated with the NAACP are approximately one thousand unincorporated branches operating in forty-five states and the District of Columbia. The branches are chartered by the NAACP, and, for failure of the branch officers to follow strictly the policies and directives of the national body, their charters may be revoked or their officers removed. The branches are generally grouped together in each state into an unincorporated association. In Virginia the association is known as the Virginia State Conference of NAACP Branches.

The State Conference holds annual conventions which are attended by delegates from the local branches. It takes the lead in NAACP's activities in this State under the administration of a full-time salaried executive secretary who is responsible to a board of directors. The executive secretary coordinates the activities of the branches in accordance with the policies and objectives of the Conference and

the NAACP, supervises local membership and fund raising campaigns, distributes educational material dealing with racial matters, and performs many other duties.

The executive secretary, members of the legal staff, and other representatives of the State Conference make speeches before local branches and other groups for the purpose of advising those present that all segregation laws are unconstitutional and void, and urging them to challenge laws to eliminate segregation through the institution of legal proceedings which the State Conference, the NAACP and the Fund sponsor at no cost to the litigants.

The aid given litigants to initiate suits is in the form of furnishing lawyers who are members of the legal committee of the Conference, the NAACP, and regional counsel of the Fund, the payment of court costs and other expenses of litigation.

The Conference receives financial support to defray the cost of litigation it sponsors and other expenses from the local branches, the national bodies, and contributions.

Letters and directives addressed to officers of local branches and signed by the executive secretary of the Conference, filed as exhibits by the appellees, show the plans, methods and procedures used by the NAACP to sponsor litigation in school cases.

A letter dated May 26, 1954, reads in part as follows:

"It is of utmost importance that your branch retain the leadership in all actions engaged in in your community."

In a letter dated June 16, 1954, it is said:

"The Conference is proceeding with the development of its plan and will advise you thereof as soon as this work is completed."

A confidential directive of June 30, 1955, from the president and executive secretary to local branches relative to the handling of petitions for presentation to local school boards stated in part as follows:

"Petitions will be placed only in the hands of highly trusted and responsible persons to secure signatures of parents or guardians only.

"The signing of the petition by a parent or guardian may well be only the first step to an extended court fight. Therefore, discretion and care should be exercised to secure petitioners who will—if need be—go all the way. * * *

"The Education Committee chairman will forward completed petitions to the Executive Secretary of the State Conference. * * *

"Following the above procedure, it becomes apparent that the faster your branches act the sooner will your school board be petitioned to desegregate your schools. Every act of our branch and the State Conference officials from this point on should be considered as an emergency action, and must take precedence over routine affairs—personal or otherwise."

Another directive contained in part these instructions:

"Organize the parents in the community so that as many as possible will be familiar with the procedure when and if law suits are begun in behalf of plaintiffs and parents.

"If no plans are announced or steps taken towards desegregation by the time school begins this fall, 1955, the time for law suits has arrived. At this stage court action is essential because only in this way does the mandate of the Supreme Court that a prompt and reasonable start towards full compliance become fully operative on the school boards in question.

"At this stage the matter will be turned over to the Legal Department and it will proceed with the matter in court."

An official report of NAACP and its Virginia Conference activities from May 17, 1954, to September 13, 1957, shows the purpose and a continuation of their method of operation as follows:

"Up to Date Picture of Action by NAACP Branches Since May 31.

"A. Petitions filed and replies.

"A total of 55 branches have circulated petitions.

"B. Where suits are contemplated.

"Petitions have been filed in seven (7) counties/cities. Graduated negative response received in all cases.

"C. Readiness of lawyers for legal action in certain areas.

"Selection of suit sites reserved for legal staff.

"State legal staff ready for action in selected areas.

"D. Do branches want legal action?

"The majority of our branches are willing to support legal action or any other program leading to early desegregation of schools that may be suggested by the National and State Conference officers. Our branches are alert to overtures by public officials that Negroes accept voluntary racial segregation in public education."

An explanation of the above report was made by the executive secretary of the Conference as follows: The language, "Where suits are contemplated," referred to places where petitions had been denied by local school boards; "Readiness of lawyers for legal action in certain areas," meant financial aid was available; and "Selection of suits reserved for legal staff," meant that members of the legal staff would pick the places where suits would be brought.

The State Conference maintains a legal staff of fifteen members, one of whom serves as chairman without compensation for that particular service. The members of the staff are elected at the annual convention of the Conference after being nominated by a committee, which in turn receives its recommendations for candidates from the chairman of the legal staff, and there have never been additional nominations from the floor of the convention.

The members of the legal staff of the Conference are reimbursed for expenses incurred in speaking before local branches and other groups and are paid fees at the rate of $60.00 per day for their services in cases in which NAACP has interested itself, "as long as such attorneys adhere strictly to NAACP policies," namely, that a school case must be tried as a direct attack on segregation. Every item of expense and all legal fees paid by the Conference

are approved by the chairman of the legal staff, except the expenses and fees of its chairman, which are approved by the president of the Conference. One member of the legal staff testified that he entered two of the school segregation cases at the suggestion of the chairman, and that the relationship "has been so pleasant and so profitable." Only members of the legal staff are selected by NAACP to bring suits in which it has an interest, and the places for bringing such suits are selected by the chairman, who refers the case to a member of the legal staff residing in the area from which the complaining party came. Without exception, when a member of the legal staff brings a lawsuit in his community other members of the staff are associated with him.

The chairman of the legal staff of the Conference is a member of the legal committee of the NAACP, Virginia counsel for the NAACP, and its registered Virginia agent.

The NAACP is not a legal aid society. Its policy during the past several years has been not to participate in cases simply because Negroes need assistance on account of poverty. Assistance is given only in cases involving constitutional rights, and then only so long as litigants adhere to the principles and policies of the NAACP and the Conference.

The initial contact in the Charlottesville school segregation case was made by the president of the local branch of the NAACP when he requested the chairman of the legal staff to speak at a meeting of parents of certain school children. At this meeting some of the parents signed authorization forms for the chairman to represent such parents and their children in legal proceedings to desegregate the schools of that city. Other authorization forms were distributed and signed with no attorney's name appearing thereon, but the name of the chairman of the legal staff was inserted later.

In the Arlington school case, the petition presented to the local school board for desegregation of the schools was prepared by the State Conference, and most of the

signatures were obtained by the vice-president of the Arlington branch, who was also one of the plaintiffs in a suit later instituted. She was told by the chairman of the legal committee of the Conference and the regional counsel of the Fund that they would institute legal proceedings if the school board denied the request to desegregate the schools.

All authorization forms used in the school segregation cases were prepared by the chairman of the legal staff and most of them authorized the attorney named therein to associate such other attorneys as he desired. Usually, the general counsel of the NAACP and the regional counsel of the Fund are associated in the trial of cases sponsored by the Conference, even though such association is not directly authorized by the litigants.

Ordinarily a complaint is filed with the executive secretary, who refers it to the chairman of the legal staff, and the chairman with the concurrence of the president of the Conference, decides whether suit will be instituted. The executive secretary, however, testified that he did not refer any of the plaintiffs in the school segregation cases to the chairman of the legal staff.

Many of the litigants in school cases had no personal contact with any of the lawyers handling cases in which their names appeared as parties plaintiff, and learned of the institution of suits from newspaper accounts. Some of the litigants stated that they did not know the names of the lawyers representing them, but they did know they were NAACP lawyers.

Only one witness, out of some twenty-four litigants in school cases, testified that he would have instituted legal proceedings if the NAACP had not agreed to finance them.

The Fund has a small membership and no affiliates. Its financial support comes from contributions solicited by letters and telegrams from New York City. The purpose of the Fund, as stated in its certificate of incorporation, is as follows:

"(a) To render legal aid gratuitously to such Negroes as may appear to be worthy thereof, who are suffering legal injustice by reason of race or color and unable to employ and engage legal aid and assistance on account of poverty.

"(b) To seek and promote the educational facilities for Negroes who are denied the same by reason of race or color.

"(c) To conduct research, collect, collate, acquire, compile and publish facts, information and statistics concerning educational facilities and educational opportunities for Negroes and the inequality in the educational facilities and educational opportunities provided for Negroes out of public funds, and the status of the Negro in American life."

The director-counsel of the Fund is charged with the duty of carrying out the purposes set out in the charter and the policies fixed by its board of directors. He has under his direction a legal research staff of six full-time lawyers who reside in New York City but who may be assigned to places out of New York. In addition to the full-time legal staff, the Fund has five regional counsel, including one residing in Richmond, Virginia, at an annual retainer of $6,000. The Fund also has at its disposal social scientists, teachers of government, anthropologists and sociologists who are used principally in cases involving school litigation.

The regional counsel of the Fund residing in Richmond, Virginia, is also a member of the legal staff of the Conference and the legal committee of the NAACP.

The Fund has been approved by the State of New York to operate as a legal aid society because of the provisions of the barratry statute of New York, but counsel stated it does not operate as such. A representative of the Fund testified in the case of the *National Association for the Advancement of Colored People* v. *Patty, supra*, that it furnishes legal assistance when a Conference lawyer requests it or when it is revealed from an investigation, made by the New York office through its regional counsel or one of the lawyers on the State Conference staff, that

discrimination exists because of race or color. All costs and expenses incurred in such suits brought on behalf of Negroes are borne by the Fund. The assistance given may be in the form of providing lawyers to assist Conference staff lawyers in the trial of a case, or in the preparation of briefs.

Most of the litigants in the school segregation cases brought in this State were financially able, according to the standards set by the Fund, to finance their own proceedings.

[1] The appellants contend that chapters 33 and 36 are: (1) penal statutes and should be strictly construed; (2) that the statutes are vague and ambiguous; (3) that the language of the statutes cannot be construed to apply to their activities; and in addition the NAACP says (4) if the statutes are construed to apply to their activities they are unconstitutional and void because they deny to it, its officers, employees, members, contributors, affiliates and attorneys the rights of freedom of speech and assembly, equal protection of the laws and due process of law under the Fourteenth Amendment to the Constitution of the United States.

Chapter 33 amends and re-enacts §§ 54-74, 54-78 and 54-79, Code of 1950. The pertinent parts of the chapter, with the amended parts in italics, are set out in the margin below.[2] These sections deal with *solicitation* of any legal

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[2] Be it enacted by the General Assembly of Virginia:

1. That at 54-74, 54-78 and 54-79 of the Code of Virginia be amended and re-enacted as follows:

§ 54-74.

* * *

(6) "Any malpractice, or any unlawful or dishonest or unworthy or corrupt or unprofessional conduct", as used in this section, shall be construed to include the improper solicitation of any legal or professional business or employment, either directly or indirectly, *or the acceptance of employment, retainer, compensation or costs from any person, partnership, corporation, organization or association with knowledge that such person, partnership, corporation, organization or association has violated any provision of Article 7 of this chapter,*

[Continued on page 12a]

or professional business or employment, either directly or indirectly, and provide for the disbarment of attorneys-

[Continued from page 11a]

or the failure, without sufficient cause, within a reasonable time after demand, of any attorney at law, to pay over and deliver to the person entitled thereto, any money, security or other property, which has come into his hands as such attorney; *provided, however, that nothing contained in this Article shall be construed to in any way prohibit any attorney from accepting employment to defend any person, partnership, corporation, organization or association accused of violating the provisions of Article 7 of this chapter.*

* * *

§ 54-78. As used in this article:

(1) A "runner" or "capper" is any person, corporation, partnership or association acting in any manner or in any capacity as an agent for an attorney at law within this State *or for any person, partnership, corporation, organization or association which employs, retains or compensates any attorney at law in connection with any judicial proceeding in which such person, partnership, corporation, organization or association is not a party and in which it has no pecuniary right or liability*, in the solicitation or procurement of business for such attorney at law * *or for such person, partnership, corporation, organization or association in connection with any judicial proceedings for which such attorney or such person, partnership, corporation, organization or association is employed, retained or compensated.*

*The fact that any person, partnership, corporation, organization or association is a party to any judicial proceeding shall not authorize any runner or capper to solicit or procure business for such person, partnership, corporation, organization or association, or any attorney at law employed, retained or compensated by such person, partnership, corporation, organization or association.*

(2) An "agent" is one who represents another in dealing with a third person or persons.

§ 54-79. It shall be unlawful for any person, corporation, partnership or association to act as a runner or capper * *as defined in* § 54-78 to solicit any business for * *an attorney at law or such person, partnership, corporation, organization or association*, in and about the State prisons, county jails, city jails, city prisons, or other places of detention of persons, city receiving hospitals, city and county receiving hospitals, county hospitals, police courts, * *county* courts, municipal courts, * courts *of record*, or in any public institution or in any public place or upon any public street or highway or in and about private hospitals, sanitariums or in and about any private institution or upon private property of any character whatsoever.

guilty of "malpractice, or [of] any unlawful or dishonest or unworthy or corrupt or unprofessional conduct."

The 1950 amendment to § 54-74, subsection (6), broadens the definition of "malpractice" to include the acceptance of employment from any person, partnership, corporation, organization or association with knowledge that such person, etc., has violated any provision of article 7, chapter 4, title 54, Code of 1950, (§§ 54-78 to 54-83, inclusive).

The amendment to § 54-78 broadens the definition of "runner" or "capper" to include any person, association or corporation acting as an agent for another person, association or corporation who or which employs an attorney in connection with any judicial proceeding in which such person, association or corporation is not a party and has no pecuniary right or liability therein.

The amendment to § 54-79 broadens the offense specified which theretofore made it unlawful for any person, corporation, partnership or association to act as a runner or capper for an attorney at law or to solicit any business for him, to make it unlawful for a person, association or corporation to solicit any business for an attorney at law or any other person, corporation or association.

Violations of § 54-79 are made misdemeanors, and the license of any attorney violating any of the provisions of chapter 33 is subject to revocation or suspension.

While it is true that penal statutes are to be strictly construed, yet in construing such statutes the intention of the legislature must govern, and such intent may be found by giving to the words used their ordinary and usual meaning. *Tiller* v. *Commonwealth*, 193 Va. 418, 420, 69 S. E. 2d 441, 443; *Northrop & Wickham* v. *Richmond*, 105 Va. 335, 339, 53 S. E. 962, 963; *Gates & Son Co.* v. *Richmond*, 103 Va. 702, 706, 707, 49 S. E. 965, 966.

We find no vagueness or ambiguity in the language of chapter 33. The words used are clear and definite in their meaning.

It is clear from the language of the act that the intent and purpose of the legislature in amending and re-enact-

ing chapter 33 was to strengthen the existing statutes to further control the evils of solicitation of legal business for the benefit of attorneys by a person who is not a party to a proceeding and in which he has no pecuniary right or liability. Solicitation of legal business has been considered and declared from the very beginning of the legal profession to be unethical and unprofessional conduct.

[2] There is no merit in the contention of the appellants that the statutes cannot be construed to apply to their activities. When we apply the plain language and meaning of the statutes to the evidence, it is perfectly manifest that the NAACP, its Virginia Conference, its branches and the Fund are engaged in the unlawful solicitation of legal business for their attorneys, in which resulting litigation they are not parties and have no pecuniary right or liability, in violation of chapter 33.

The declared purpose of the NAACP and the Fund is to eradicate every form of racial discrimination. To accomplish this objective the NAACP has organized Negroes throughout the Commonwealth into branches, and formed a legal staff for the purpose of directing and controlling all actions pertaining to racial matters. Members of the NAACP, representatives of the Conference and its legal staff appear before the membership of local branches and other groups in communities in which the organizations wish suits to be brought and by persuasive methods urge those present to assert their constitutional rights to eliminate racial discrimination by becoming parties plaintiff to legal proceedings, when many of the prospective litigants have had no previous thought of doing so. The services of attorneys selected by the NAACP, its Conference and the Fund are offered at no cost to the prospective litigants as an inducement to institute suits. The litigants and attorneys, however, must adhere to a policy of permitting the NAACP, the Conference and the Fund to direct and control the litigation.

The absence of the usual contact between many of the litigants and the attorneys instituting proceedings is indicative of the control of the litigation by the NAACP and the Conference.

Since the appellants do not operate as legal aid societies, the financial ability of litigants to prosecute their own cases is not considered by the NAACP, the Conference and the Fund in soliciting litigants. A person does not have to be indigent for the NAACP, the Conference and the Fund to pay all costs of litigation.

The communications and activities of the NAACP, the Conference and branches, indicate their plans, methods and procedures in obtaining litigants, and may be summarized as follows:

"* * * Mr. Thurgood Marshall, chief legal counsel of the NAACP, has said that the hardest job his staff has had in bringing equal-education suits has been to persuade Negro teachers and representative Negro parents to stand as plaintiffs. * * *." (*The National Association for the Advancement of Colored People; A Case Study in Pressure Groups*, St. James, Exposition Press, Inc., at p. 107.)

In short, the activities of the NAACP, its Conference and the Fund clearly show that they are engaged in fomenting and soliciting legal business in which they are not parties and have no pecuniary right or liability, and which they channel to the enrichment of certain lawyers employed by them, at no cost to the litigants and over which the litigants have no control.

There was evidence on behalf of the Fund in the record of the case of the *National Association for the Advancement of Colored People* v. *Patty, supra*, heard by the three-judge Federal court, and filed as a part of the record in these causes, that it participates in cases only when a prospective litigant appears and requests assistance. However, that does not appear to be the case under the additional evidence taken in these causes, much of which was heard *ore tenus* by the court below. Legal business is solicited by

the NAACP, representatives of the Conference and its legal staff, of which the regional counsel for the Fund is a member, and he and the Fund are fully acquainted with methods and procedures used to obtain litigants to whom the Fund gives assistance. The evidence shows that the regional counsel of the Fund is usually associated with Conference lawyers in school segregation cases, although he is not generally named in the authorization or power of attorney to institute suit.

[3] There is no merit in the appellants' argument that their activities are not what are commonly considered by the legal profession as solicitation of business contrary to the canons of legal ethics. They rely on several cases which are readily distinguishable under the facts from these causes now before us. Typical of the cases cited is *Gunnels* v. *Atlanta Bar Association*, 191 Ga. 366, 12 S. E. 2d 602, 132 A. L. R. 1165.

In the *Gunnels* case the court upheld the right of the Atlanta Bar Association to furnish counsel to persons who had been victims of sharp loan practices. The attorneys did not receive compensation for their services and the Bar Association did not stand between counsel and client or exercise control over the litigation. The usual and proper relationship of attorney and client existed in that case, which does not exist under the evidence in the causes now before us.

In referring to the relationship that should exist between attorney and client, in the case of *Richmond Ass'n of Credit Men* v. *Bar Association*, 167 Va. 327, 189 S. E. 153, this Court quoted with approval the following (167 Va. at p. 335, 189 S. E. at p. 157):

"'The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent, and it cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the

directions of the corporation and not to the directions of the client.' *Re Co-Operative Law Co.*, 198 N. Y. 479, 92 N. E. 15, 16, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879."

The acceptance of employment by an attorney in cases in which the NAACP, its Conference and branches act as intermediaries in the solicitation of legal business not only violates chapter 33, but also canons 35 and 47 of the canons of professional ethics adopted by this Court on October 21, 1938, 171 Va. p. xxxii.

Canon 35 reads in part as follows:

"*Intermediaries.*—The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigent are not deemed such intermediaries." 171 Va. p. xxxii.

Canon 47 reads as follows:

"*Aiding the Unauthorized Practice of Law.*—No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate." 171 Va. p. xxxv.

In the Ninth Annual Report of the Virginia State Bar, p. 39, is found an opinion, rendered by the Committee on Unauthorized Practice, which is pertinent in these causes. A union retained an attorney on a salary basis to represent all of its individual members in their claims for compensation before the State Industrial Commission. He received no fees from the individuals for such representation. His sole compensation came from the salary paid him by the union. The committee held that the union was engaged in

the practice of law without a license; that it was intervening between the attorney and his clients; and that the attorney was violating the canons of legal ethics.

Courts from other jurisdictions have held that corporations or associations carrying on activities somewhat similar to those of the appellants were engaged in the illegal practice of law and their attorneys were violating the canons of legal ethics.

*In re Maclub of America, Inc.*, 295 Mass. 45, 3 N. E. 2d 272, 105 A. L. R. 1360, an automobile association had been formed for the purpose of furnishing its members with lists of attorneys who would perform services for such members free of charge. The attorneys looked to the association for payment, but the association took no part in the direction or control of the case. The court held that the association was engaged in the illegal practice of law; that the relationship of attorney and client did not exist between the association's members and the attorney; that the particular attorney was compensated by the association and subject to its instructions; that the association possessed the right to hire and fire; and that the practice was considered a contract to furnish legal assistance rather than a contract to pay for legal assistance.

In *People ex rel. Courtney* v. *Association of Real Estate Taxpayers*, 354 Ill. 102, 187 N. E. 823, 826, a corporation was organized to permit united protection of certain taxpayers in matters of taxation and legislation. The owners of real estate were invited to become members by the payment of a fee. Attorneys were selected and paid by the corporation to represent it in taxation litigation and the corporation would determine what questions would be litigated. The court held that, even though suits were brought in the names of individual members, and fees would have cost an individual approximately $200,000, the corporation was engaged in the illegal practice of law.

For other cases, see *People ex rel. Chicago Bar Association* v. *Chicago Motor Club*, 362 Ill. 50, 199 N. E. 1; (a non-profit corporation) *Doughty* v. *Grills*, 37 Tenn. App. 63, 260 S. W. 2d 379; *Hildebrand* v. *State Bar of California*, 36 Cal. 2d 504, 225 P. 2d 508; *Atchison, Topeka & Santa Fe Railway Co.* v. *Jackson* (10 Cir.), 235 F. 2d 390, 393; *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N. E. 2d 163, 167.

[4] The appellants also argue that because they are aiding others in asserting their constitutional rights chapter 33 should not be construed to limit their activities. This argument is without merit. Statutes enacted by the General Assembly in the public interest to regulate the practice of law cannot be violated, and canons of legal ethics should not be ignored simply because constitutional rights are asserted. The law provides a procedure for one to follow in asserting his constitutional rights, as well as all other legal rights, and the objective may be achieved without violating statutes and the standards of the legal profession.

[5] The NAACP next contends that chapter 33 is unconstitutional and void because it violates the rights of freedom of speech and assembly, and denies to it, its affiliates, officers, employees, voluntary workers, attorneys and contributors due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. There is no merit in this contention.

In support of the argument that chapter 33 violates their rights of freedom of speech and assembly, protected under the First Amendment and guaranteed by the Fourteenth Amendment to the Constitution of the United States, they rely on such cases as *Watkins* v. *United States*, 354 U. S. 178, 77 S. Ct. 1173, 1 L. ed. 2d 1273; *Sweezy* v. *State of New Hampshire*, 354 U. S. 234, 77 S. Ct. 1203, 1 L. ed. 2d 1311; and *Thomas* v. *Collins*, 323 U. S. 516, 65 S. Ct. 315, 89 L. ed. 430.

In the *Watkins* case, *supra*, a congressional committee inquired of a witness as to his past associations and he refused to identify his associates during that period on the ground that he did not believe they were now identified with the Communist Party and the questions asked were "outside the proper scope of the committee's activities." On appeal from his conviction for contempt, the Supreme Court held that the pertinency of the question had not been shown; that Congress had not authorized the committee to make an investigation of this nature; and that a conviction for contempt for refusal to answer could not be sustained.

In *Sweezy* v. *State of New Hampshire*, *supra*, the witness, a teacher in the State university, refused to tell a committee of the state legislature the substance of a lecture he had given at the university, or anything about his opinions and beliefs, on the grounds that the questions were not pertinent to the inquiry and infringed on his freedom of speech, protected under the First Amendment. The court held that the witness was not in contempt, since the resolution of the legislature authorizing the inquiry was not broad enough to permit the question.

Obviously, the holdings in the *Watkins* and *Sweezy* cases have no application here, since the court's decisions rested on the relevancy and pertinency of the questions asked by the committees.

It is true that under the holding in the case of *Thomas* v. *Collins*, *supra*, representatives of the NAACP and the Conference have a right to peaceably assemble with the members of the branches and other groups to discuss with and advise them relative to their legal rights in matters concerning racial segregation. But under the evidence of the causes before us the appellants and their associates go beyond that. They solicit prospective litigants to authorize the filing of suits by NAACP and Fund lawyers, who are paid by the Conference and controlled by NAACP policies, in violation of chapter 33.

Chapter 33 does not deny the appellants, or those associated with them, freedom to speak and assemble. The purpose and intent of the chapter is to regulate the practice of law and to bring such practice in harmony with the ethical standards of the profession. It prohibits, under certain circumstances, the solicitation of legal business. The prohibition of solicitation of legal business is merely a regulation in the interest of the public and the legal profession.

A State, under its police power, has the right to require high standards of qualifications and ethical conduct from those who desire to practice law within its borders (*Bradwell* v. *Illinois*, 83 U. S. (16 Wall.) 130, 139, 21 L. ed. 442; *Schware* v. *Board of Bar Examiners of the State of New Mexico*, 353 U. S. 232, 77 S. Ct. 752, 756, 1 L. ed 796, 64 A. L. R. 2d 288), and it may revoke or suspend the license to practice law of attorneys who are guilty of unethical conduct. *Richmond Association of Credit Men* v. *Bar Association*, 167 Va. 327, 334-336, 189 S. E. 153, 157; *Campbell* v. *Third District Committee*, 179 Va. 244, 249, 250, 18 S. E. 2d 883, 885.

A statute which forbids laymen to solicit employment for attorneys, or engage in the business of furnishing attorneys to render legal services, is a valid police regulation not violative of any constitutional restriction. *McCloskey* v. *Tobin*, 252 U. S. 107, 40 S. Ct. 306, 64 L. ed. 481; *Hightower* v. *Detroit Edison Co.*, 262 Mich. 1, 247 N. W. 97, 86 A. L. R. 509; *Kelly* v. *Bogue*, 239 Mich. 204, 214 N. W. 316, 53 A. L. R. 273; *Chicago, B. & Q. R. Co.* v. *Davis*, 111 Neb. 737, 197 N. W. 599, 601; 14 C. J. S., Champerty and Maintenance, § 35, p. 381; Anno. 53 A. L. R., p. 279-280.

[6] We shall now direct our attention to chapter 36 (§§ 18-349.31 to 18-349.37, inclusive, Code of 1950, as amended, 1958 Cum. Supp.) Acts of Assembly, Ex. Sess.

1956, p. 37, the pertinent parts of which are printed in the margin.[3]

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[3] Be it enacted by the General Assembly of Virginia:

1. § 1. (a) It shall be unlawful for any person not having a direct interest in the proceedings, either before or after proceedings commenced

to promise, give or offer, or to conspire or agree to promise, give or offer, or

to receive or accept, or to agree or conspire to receive or accept, or

to solicit, request or donate

Any money, bank note, bank check, chose in action, personal services or any other personal or real property, or any other thing of value, or any other assistance as an inducement to any person to commence or to prosecute further any original proceeding in any court of this State, or before any board or administrative agency within the said State, or in any United States court located within the said State against the Commonwealth of Virginia, any department, agency or political subdivision thereof, or any person acting as an officer or employee for either or both or any of the foregoing; provided, however, this section shall not be construed to prohibit the constitutional right of regular employment of any attorney at law, for either a fixed fee or upon a contingent basis, to represent such person, firm, partnership, corporation, group, organization or association before any court or board or administrative agency.

(b) It shall be unlawful for any person, not related by blood or marriage or who does not occupy a position of trust or a position in loco parentis to one who becomes the plaintiff in a suit or action, who has no direct interest in the subject matter of the proceeding and whose professional advice has not been sought in accordance with the Virginia canons of legal ethics, to advise, counsel or otherwise instigate the bringing of a suit or action against the Commonwealth of Virginia, any department, agency or political subdivision thereof, or any person acting as an officer or employee for either or both or any of the foregoing.

(c) As used in this act, "person" includes person, firm, partnership, corporation, organization or association; "direct interest" means a personal right or a pecuniary right or liability.

[Continued on page 23a]

This chapter, like chapter 33, deals with the regulation and supervision of the practice of law and is a valid legislative enactment under the State's police power unless it invades rights protected and guaranteed by the State and Federal Constitutions.

The NAACP contends that the chapter is unconstitutional and void because it violates the rights of freedom of speech and assembly and denies to it, its officers, employees, voluntary workers, attorneys and contributors due process of law and the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

On the other hand, the appellees say that the chapter does not violate any constitutional guarantees, and that under

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[Continued from page 22a]

(d) Any person violating any of the provisions of § 1 of this act shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than one thousand dollars or confined in jail for not more than one year, or both.

* * * *

§ 6. This act shall not be applicable to attorneys who are parties to contingent fee contracts with their clients where the attorney does not protect the client from payment of the costs and expense of litigation, nor shall this act apply to a mandamus proceeding against the State Comptroller, nor shall this act apply to any matter involving zoning, annexation, bond issues, or the holding or results of any election or referendum, nor shall this act apply to suits pertaining to or affecting possession of or title to real or personal property, regardless of ownership, nor shall this act apply to suits involving the legality of assessment or collection of taxes or the rates thereof, nor shall this act apply to suits involving rates or charges or services by common carriers or public utilities, nor shall this act apply to criminal prosecutions, nor to the payment of attorneys by legal aid societies approved by the Virginia State Bar, nor to proceedings to abate nuisances. Nothing herein shall be construed to be in derogation of the constitutional right of real parties in interest to employ counsel or to prosecute any available legal remedy under the laws of this State. The provisions hereof shall not affect the right of a lawyer in good faith to advance expenses as a matter of convenience but subject to reimbursement.

the evidence the appellants have violated the statute, which is merely a common law definition of maintenance[4] with the recognized exceptions.

Section 1(a) of the act makes it unlawful, with certain exceptions, for any person not having a "direct interest" in a legal proceeding to promise, give, offer, donate money, personal services, or any other thing of value, or "any other assistance as an inducement to any person *to commence or to prosecute further* any original proceeding in any court of this State, or before any board or administrative agency within the said State, or in any United States court located within the said State against the Commonwealth of Virginia," its agencies or political subdivisions, or any officer or employee thereof. (Emphasis added.)

Section 1(b) makes it "unlawful for any person, not related by blood or marriage or who does not occupy a position of trust or a position in loco parentis to one who becomes the plaintiff in a suit or action, who has no direct interest in the subject matter of the proceeding and whose professional advice had not been sought in accordance with the Virginia canons of legal ethics, to *advise, counsel or otherwise instigate* the bringing of a suit or action against the Commonwealth of Virginia, any department, agency or political subdivision thereof, or any person acting as an officer or employee for either or both or any of the foregoing." (Emphasis added.)

We have frequently said that the test of the constitutional validity of a law is not merely what has been done under it, *but what may by its authority be done. Edwards* v. *Commonwealth*, 191 Va. 272, 285, 60 S. E. 2d 916, 922;

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[4] Maintenance is "an officious intermeddling in a suit that in no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend it." 4 Blackstone's Commentaries, p. 135. See also 10 Am. Jur., Champerty and Maintenance, § 1, p. 549.

*Richmond* v. *Carneal*, 129 Va. 388, 393, 106 S. E. 403, 405, 14 A. L. R. 1341; *Violett* v. *City of Alexandria*, 92 Va. 561, 574, 23 S. E. 909, 913, 31 L. R. A. 382.

Under § 1(a) a friend or neighbor of a poor man is prohibited from aiding him in asserting his claim against the Commonwealth, its agencies or political subdivisions, if his claim does not fall within the exceptions enumerated in § 6 of chapter 36, no matter how meritorious it may be.

The law has always recognized the right of one to assist the poor in commencing or further prosecuting legal proceedings. To deny this right would be oppressive and enable the other party, if his means so permits, an advantage over one with little means. Aiding the indigent is one of the generally recognized exceptions to the law of maintenance. *Gilman* v. *Jones*, 87 Ala. 691, 5 So. 785, 786-787; *Rice* v. *Farrell*, 129 Conn. 362, 28 A. 2d 7, 9; 14 C. J. S., Champerty and Maintenance, § 24, p. 368; 4 Blackstone's Commentaries, ch. 10, pp. 135 et seq.

This section denies to an indigent person free access to the courts, both State and Federal, except those within the enumerated class under § 6 of chapter 36, which is a fundamental right of all men, and denies to him due process of law.

A person who desires to aid an indigent suitor, unless his case falls within the expected class, is deprived, under the terms of the act, of his fundamental right to use his property in a lawful manner and is made criminally liable if he does give such aid.

[7] Where the principle of free discussion is concerned, it is the statute and not the accusation or the evidence under it which prescribes the limits of permissible conduct. *Thornhill* v. *Alabama*, 310 U. S. 88, 60 S. Ct. 736, 84 L. ed. 1093.

Under § 1(b) of the act, no person or association, including the appellants, except those within the excepted classification, may advise or counsel any person or group

with respect to instituting or prosecuting actions against the State, its agencies or political subdivisions, or their officers or employees, to assert what these persons or groups may believe are their legal or constitutional rights. Nor may the appellants render financial aid to these people in such litigation, even though the litigants may select and employ counsel of their own choosing, in accordance with the recognized canons of legal ethics.

This section denies the right of freedom of speech, guaranteed by the Virginia Bill of Rights (Constitution § 12), secured by the First Amendment to the Constitution of the United States and guaranteed by the Fourteenth Amendment, which give one the right to hold views on all controversial questions, to express such views, and to disseminate them to persons who may be interested, and neither the Federal nor State government can take any action which might prevent such free and general discussion of public matters as may seem to be essential to prepare people for an intelligent exercise of what they may consider to be their rights as citizens. See 16 C. J. S., Constitutional Law, § 213(1), pp. 1093, 1094, and the many cases there cited.

A state may forbid one to practice law without a license, but it cannot prevent an unlicensed person from making a speech before an assembly, telling them of their rights and urging them to assert same. See *Thomas* v. *Collins, supra*, (concurring opinion, 323 U. S. 516, p. 544, 65 S. Ct. 315, 89 L. ed 430).

State statutes must be specifically directed to acts or conduct which overstep legal limits, and not include those which keep within the protected area of free speech. *Edwards* v. *Commonwealth, supra* (191 Va. at p. 285, 60 S. E. 2d at p. 922).

While the appellants, and those associated with them, cannot solicit and channel legal business to attorneys whom they pay, and who are subject to their directions, in violation of chapter 33, a statute which prohibits them from

advising any person or group to institute suits for the purpose of asserting what they believe to be their legal rights is a denial of the right of freedom of speech, and is unconstitutional and void.

[8] Section 1(b) not only violates the right of freedom of speech, but § 6 of the act exempts from its operation a host of potential litigants, and says in effect that what is a criminal act when done by unexcepted litigants, including the appellants, is not a criminal act when done by excepted litigants. There is no reasonable basis for excepting a great number of litigants from the application of the act while making it applicable to others. Thus it denies to the unexcepted litigants the equal protection of the laws.

Equal protection of the laws, guaranteed under the Fourteenth Amendment, does not preclude a State from resorting to classification for purposes of legislation, but such classification must be reasonable and not arbitrary, and rest on some ground of difference or distinction which bears a fair and substantial relation to the subject or object of legislation, so that all persons similarly situated shall be treated alike. *C. I. T. Corp.* v. *Commonwealth*, 153 Va. 57, 68, 149 S. E. 523, 525, 526; *Bryce* v. *Gillespie*, 160 Va. 137, 143, 168 S. E. 652, 655.

For the reasons given, we hold:

(1) That chapter 33 is a valid regulation of the practice of law, enacted under the police power of the State, and is not violative of any constitutional restrictions;

(2) That the solicitation of legal business by the appellants, their officers, members, affiliates, voluntary workers and attorneys, as shown by the evidence, violates chapter 33 and the canons of legal ethics;

(3) That the attorneys who accept employment by appellants to represent litigants in suits solicited by the appellants, or those associated with them, are violating chapter 33 and the canons of legal ethics;

(4) That chapter 36 is unconstitutional and void because it violates the right of freedom of speech under both the State and Federal Constitutions and denies due process of law and equal protection of the laws under the Fourteenth Amendment. Therefore,

(a) the appellants and those associated with them may not be prohibited from acquainting persons with what they believe to be their legal rights and advising them to assert their rights by commencing or further prosecuting a suit against the Commonwealth of Virginia, any department, agency or political subdivision thereof, or any person acting as an officer or employee of such, but in so advising persons to commence or further prosecute such suits the appellants, or those associated with them, shall not solicit legal business for their attorneys or any particular attorneys; and

(b) the appellants and those associated with them may not be prohibited from contributing money to persons to assist them in commencing or further prosecuting such suits, which have not been solicited by the appellants or those associated with them, and channeled by them to their attorneys or any other attorneys.

The decree appealed from is affirmed in part, reversed in part and remanded for the entry of a decree consistent with the views expressed herein.

*Affirmed in part; reversed in part; and remanded.*

**(Judgment)**

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is error only in part of the decree appealed from. It is therefore adjudged, ordered and decreed that the said decree, in so far as it holds that Chapter 33, Acts of Assembly, Extra Session, 1956, is a constitutional and valid enactment, and that the appellant and those connected with it in carrying out the activities of the appellant are in violation of the provisions of this chapter, be, and the same is hereby affirmed.

It is further adjudged, ordered and decreed that the said decree, in so far as it holds that Chapter 36, Acts of Assembly, Extra Session, 1956, is a constitutional and valid enactment, be, and the same is hereby reversed and annulled, and the cause is remanded to the said circuit court for the entry of a decree consistent with the views expressed in the said written opinion of this court.

And the appellees having substantially prevailed, it is further adjudged, ordered and decreed that the appellant pay to the appellees their costs by them expended about their defense herein.

Entered: September 2, 1960

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**(Denial of Petition for Rehearing)**

(Filed October 12, 1960)

On mature consideration of the petition of National Association for the Advancement of Colored People, a corporation, appellant, to set aside the decree entered herein on September 2, 1960, and grant a rehearing thereof, the prayer of the said petition is denied.

# APPENDIX B

**(Opinion of the United States District Court for the Eastern District of Virginia Entered January 21, 1958)**

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, a corporation, NAACP. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., a corporation,

Plaintiffs,

*against*

KENNETH C. PATTY, Attorney General for the Commonwealth of Virginia, et al.,

Defendants.

Before:

SOPER, Circuit Judge and
HUTCHESON and HOFFMAN, District Judges.
HUTCHESON, District Judge concurring in part and dissenting.

SOPER, Circuit Judge:

These companion suits were brought by the National Association for the Advancement of Colored People and the N. A. A. C. P. Legal Defense and Educational Fund, Inc., corporations of the State of New York, against the Attorney General of the Commonwealth of Virginia and the Commonwealth Attorneys for the City of Richmond, the City of Newport News, the City of Norfolk, Arlington County and Prince Edward County, Virginia, to secure a declaratory judgment and an injunction restraining and enjoining the defendants from enforcing or executing Chapters 31, 32, 33, 35 and 36 of the Acts of Assembly of the

[1] These Acts have been respectively codified in the Code of Virginia at §§ 18-349.9 *et seq.*, 18-349.17 *et seq.*, 54-74, 78; 79; 18-349.25 *et seq.*, and 18-349.31 *et seq.*

Commonwealth, all of which were passed at the Extra Session convened between August 27, 1956, and September 29, 1956, and were approved by the Governor of the Commonwealth on September 29, 1956.

The suits are based on the allegation that the statutes are unconstitutional and void, in that they deny to the plaintiffs rights accorded to them by the Fourteenth Amendment to the Constitution of the United States.

Jurisdiction is invoked under the civil rights statutes, 42 U. S. C. §§ 1981 and 1983 and 28 U. S. C. § 1343, under which the district courts have jurisdiction of actions brought to redress the deprivation under color of state law of any right, privilege or immunity secured by the Constitution or statutes of the United States providing for equal rights of all persons within the jurisdiction of the United States. Jurisdiction is also invoked under 28 U. S. C. §§ 1331 and 1332 wherein jurisdiction is conferred upon the federal courts in all civil actions where the matter in controversy exceeds the sum of $3,000.00 exclusive of interest and costs and arises under the Constitution and law of the United States or between citizens of different states. Accordingly, the present three-judge district court was set up under 28 U. S. C. § 2281 and evidence was taken upon which the following findings of facts are based.

The National Association for the Advancement of Colored People is a non-profit membership organization which was established in 1909 and incorporated under the laws of the State of New York in 1911. It is licensed to do business as a foreign corporation in the State of Virginia. The purposes of the corporation are set out in the statement of its charter:

> "That the principal objects for which the corporation is formed are voluntarily to promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to advance the interests of colored citizens; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their

children, employment according to their ability, and complete equality before the law.

"To ascertain and publish all facts bearing upon these subjects and to take any lawful action thereon; together with any and all things which may lawfully be done by a membership corporation organized under the laws of the State of New York for the further advancement of these objects."

The activities of the Association cover forty-four states, the District of Columbia and the Territory of Alaska. It is the most important Negro rights organization in the country (see 6 Western Res. L. Rev. 101, 102; 58 Yale L. J. 574, 581), having approximately 1,000 unincorporated branches. A branch consists of a group of persons in a local community who enroll the minimum number of members and upon formal application to the main body are granted a charter. In Virginia, there are eighty-nine active branches. A person becomes a member of a branch upon payment of dues which amount, at a minimum, to $2.00 per year and may be more at the option of the member, up to the sum of $500.00 for life membership. The regular dues of $2.00 per year are divided into two parts, one-half being sent to the national office in New York and one-half retained by the local branch.

In a number of states, including Virginia, the branches are voluntarily grouped into an unincorporated State Conference, the expenses of which are paid jointly by the national organization and the local branches, each contributing 10-cents out of its share of each member's dues. In Virginia, the branches contribute a greater sum for the support of their State Conference.

The principal source of income of the Association and its branches in the several states consists of the membership fees which are solicited in local membership drives. Other income is derived from special fund raising campaigns and individual contributions. In the first eight months of the year the greater number of annual membership drives

are conducted. During that period in 1957 the Association enrolled 13,595 members in Virginia. This represents a sharp reversal of the rising trend in membership figures in the same eight-month period in the preceding three years, which showed 13,583 members in 1954, 16,130 in 1955 and 19,436 in 1956. The income of the Association from its Virginia branches during the first eight months of 1957 was $37,470.60 as compared with $43,612.75 for the same period in 1956. The total amount received by the Association from Virginia was $38,469.59 in the first eight months of 1957 as compared with $44,138.71 for the same period in 1956. The total income of the Association from the country as a whole for the year 1956 was $598,612.84 and $425,608.13 for the first eight months of 1957.

At the top of the organizational structure of the national body is the annual convention, which consists of delegates representing the 1,000 branches in the several states. It has the power to establish policies and programs for the ensuing year which are binding upon the Board of Directors and upon the branches of the Association. Each year the convention chooses sixteen members of a Board of forty-eight Directors, each of whom serves for a term of three years. The Board of Directors meets eleven times a year to carry out the policies laid down by the convention. Under the Board an administrative staff is set up, headed by an executive secretary who, representing the Board, presides over the functioning of the local branches and State Conferences throughout the country under the authority of the constitution and by-laws of the national body.

The Virginia State Conference takes the lead of the Association's activities in the state under the administration of a full-time salaried executive secretary, by whom the activities of the branches in the state are co-ordinated and local membership and fund raising campaigns are supervised. The State Conference also holds annual conventions attended by delegates from the branches, who elect officers and members of the Board of Directors of the

Conference. Through its representatives the State Conference appears before the General Assembly of Virginia and State Commissions in support of or in opposition to measures which in its view advance or retard the status of the Negro in Virginia. It encourages Negroes to comply with the statutes of the state so as to qualify themselves to vote, and it conducts educational programs to acquaint the people of the state with the facts regarding racial segregation and discrimination, and to inform Negroes as to their legal rights and to encourage the assertion of those rights when they are denied. In carrying out this program, the public is informed of the policies and objectives of the Association through public meetings, speeches, press releases, newsletters and other media.

One of the most important activities of the State Conference, perhaps its most important activity, is the contribution it makes to the prosecution of law suits brought by Negroes to secure their constitutional rights. It has been found, through years of experience, that litigation is the most effective means to this end when Negroes are subjected to racial discrimination either by private persons or by public authority. Accordingly, the Virginia State Conference maintains a legal committee or legal staff composed of thirteen colored lawyers located in seven communities scattered over the greater part of the state. The members of the legal staff are elected at the annual convention of the State Conference and they in turn elect a chairman. Ordinarily the legal staff is called into action upon a complaint made to one or more members of the staff by aggrieved parties, but sometimes a grievance is brought directly to the attention of the Executive Secretary of the Conference, and if in his judgment the case presents a genuine grievance involving discrimination on account of race or color, which falls within the scope of the work of the Association, he refers the parties to the Chairman of the legal staff. If the Chairman approves the complaint, he recommends favorable action to the President of the State Conference

and if he concurs, the Conference obligates itself to defray in whole or in part the costs and expenses of the litigation. With rare exceptions the attorneys selected by the complainant to bring the suit have been members of the legal staff. When a law suit has been completed the attorney is compensated by the Conference for out-of-pocket expenditures, including travel and stenographic services, and is also paid per diem compensation for the time spent in his professional capacity. No money ever passes directly to the plaintiff or litigant. The attorneys appear in the course of the litigation for and on behalf of the individual litigants, who in every instance authorize the institution of the suit.

In brief, the Association, in various forms, publicizes its policies against discrimination and informs the public that it will offer aid for the prosecution of a legitimate complaint involving improper discrimination. Thus it is generally known that the State Conference will furnish money for litigation if the proper need arises, but the Association does not take the initiative and does not act until some individual comes to it asking for help.

Sometimes a complainant seeks damages for violation of his rights, as in cases involving the treatment accorded Negroes in public conveyances. In such a case, the Association ordinarily does not furnish aid if the complainant is financially able to prosecute his claim. In the most fruitful field of litigation in respect to public education, the rights of large numbers of colored people in the community are involved and a class suit is brought; and the Association pays the expenses even if one or more of the complainants is possessed of financial resources. In most of these cases the expenses of the suit are so great that it could not be prosecuted without outside aid. The fees paid the lawyers are modest in size and less than they would ordinarily earn for the time consumed.

The N. A. A. C. P. Legal Defense and Educational Fund, Inc., the plaintiff in the second suit, also takes a prominent part in support of litigation on behalf of Negro citizens.

It is a membership corporation which was incorporated under the law of the State of New York in 1940. Like the Association, the Fund is registered with the Virginia Corporation Commission as a foreign corporation doing business in the state. It was formed, as its name implies, to assist Negroes to secure their constitutional rights by the prosecution of law suits of the sort that have just been described. The charter declares that its purposes are to render legal aid gratuitously to Negroes suffering "legal injustice" by reason of race or color who are unable on account of poverty to employ and engage legal aid on their own behalf. Other purposes are to secure educational facilities for Negroes who are denied the same by reason of their race and color and to conduct research and to compile and publish information on this subject and generally on the status of the Negro in American life. The charter forbids the corporation to attempt to influence legislation by propaganda or otherwise and requires it to operate without pecuniary benefit to its members. The charter was approved by a New York court after service upon and without objection from the local bar association so that it obtained the right under the law of New York to operate as a legal aid society.

The Fund is governed by a Board of Directors which, under its charter, consists of not less than five and not more than fifty members. Its work is directed by the usual executive officers. It operates from an office in New York City and has no subordinate units. It employs a full-time staff of six resident attorneys and three research attorneys stationed in New York City, and it keeps four lawyers on annual retainers in Richmond, Dallas, Los Angeles and Washington. It also engages local attorneys for investigation and research in particular cases. It has on call one hundred lawyers throughout the country and a large number of social scientists who operate on a voluntary basis and work without pay or upon the payment of expenses only. By virtue of its efforts to secure equal rights and

opportunities for colored citizens in the United States, the Fund has become regarded as an instrument through which colored citizens of the United States may act in their efforts to combat unconstitutional restrictions based upon race and color.

In order to give information as to the nature of the work of the Fund, members of the legal staff engage in public speaking and lectures in colleges and universities throughout the country on a variety of subjects connected with the legal rights of colored citizens and the race problem in general. But in conformity with the charter of the Fund, the officers and employees of the corporation do not attempt to influence legislation, by propaganda or otherwise.

It is apparent that so far as litigation is concerned the purposes of the Association and of the Fund are identical, and they in fact cooperate in this activity. They are, however, separate corporate bodies with separate offices. At one time some of the executive officers were in the employ of both corporations but at the present no person serves as an officer or employee, although many persons are members of both bodies. The Fund was formed as a separate organization because it was thought that it should have no part in attempting to influence legislation and the complete separation has been promoted by rulings of the Treasury Department, which disallow tax deductions for contributions to organizations engaged in political activity. Deductions for contributions to the Fund are allowed.

The revenues of the Fund are derived solely from contributions received in response to letters sent out four times a year throughout the country by the Committee of One Hundred and, to some extent, from solicitations at small luncheons or dinners. There are no membership dues. The Committee of One Hundred was organized in 1941 by Dr. Neilsen, former president of Smith College, and consists predominantly of educators and lawyers who

have joined together for the purpose of raising the money necessary to keep the organization going. Most of the money comes in the form of $5.00 and $10.00 contributions. Substantial sums are received from charitable foundations, of which the largest was $15,000 and the aggregate was $50,000 in 1956. For the four or five years prior to 1957 the income showed a steady increase. The income for 1956 was $351,283.32. For the first eight months of 1955, 1956 and 1957 the income was $152,000.00, $246,000.00 and $180,000.00, respectively. The receipts from Virginia were $1,469.50 in 1954; $6,256.19 in 1955, a portion of which was a refund from prior litigation; $1,859.20 in 1956, and $424.00 for the first eight months in 1957.

The total disbursements of the Fund for the year 1956 were $268,279.03. The total expenses for Virginia during the past four years consisted principally of the sum of $6,000.00, which was the annual retainer of the regional counsel.

The Fund supplements the work of the legal staff of the Virginia State Conference by contributing the services of the regional counsel and, more particularly, by furnishing results of the research of scientists, lawyers and law professors in various parts of the country. The Fund also contributes the very large expenditures which are needed for the prosecution of important cases that go from the federal courts in Virginia and other states to the Supreme Court of the United States in which the fundamental rules governing racial problems are laid down. In this class of case the expenses amount to a sum between $50,000 and $100,000, and in the celebrated case of *Brown* v. *Board of Education*, the expenses amounted to a sum in excess of $200,000. The expenses of cases tried in the lower courts, including an appeal to the Court of Appeals for the Circuit, amount to approximately $5,000.00.

The Fund has made only a superficial investigation into the financial competency of complainants to whom it has rendered aid in Virginia. For the most part the cases have been class actions brought for the benefit of all the

colored citizens in a community with children in the local public schools and the regional counsel of the Fund has entered the cases at the request of members of the legal staff of the State Conference. It has been obvious in such instances that the burden of the litigation was too great for the individual litigants to bear, and the lawyers for the Fund have not regarded their participation as a violation of the charter provision authorizing the Fund to aid indigent litigants even if it was shown that some of the complainants in a case had legal title to homes of substantial value.[2]

### Statutes in Suit

The five statutes against which the pending suits are directed, that is, Chapters 31, 32, 33, 35 and 36 of the Acts of the General Assembly of Virginia, passed at its Extra Session in 1956, were enacted for the express purpose of impeding the integration of the races in the public schools of the state which the plaintiff corporations are seeking to promote. The cardinal provisions of these statutes are set forth generally in the following summary.

Chapters 31 and 32 are registration statutes. They require the registration with the State Corporation Commission of Virginia of any person or corporation who engages in the solicitation of funds to be used in the prosecution of suits in which it has no pecuniary right or liability, or in suits on behalf of any race or color, or who engages as one of its principal activities in promoting or opposing the passage of legislation by the General Assembly on behalf of any race or color, or in the advocacy of racial integration or segregation, or whose activities

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[2] Testimony as to the activities of the Association and of the Fund was given in large part by Roy Wilkins, executive secretary of the Association; Thurgood Marshall, director counsel of the Fund; W. Lester Banks, executive secretary of the Virginia State Conference; Oliver W. Hill, chairman of the legal staff of the Virginia State Conference; Spotswood W. Robinson III, southeast regional counsel for the Fund.

tend to cause racial conflicts or violence. Penalties for failure to register in violation of the statutes are provided.

Chapters 33, 35 and 36 relate to the procedure for suspension and revocation of licenses of attorneys at law, to the crime of barratry and to the inducement and instigation of legal proceedings. It is made unlawful for any person or corporation: to act as an agent for another who employs a lawyer in a proceeding in which the principal is not a party and has no pecuniary right or liability; or to accept employment as an attorney from any person known to have violated this provision; or to instigate the institution of a law suit by paying all or part of the expenses of litigation, unless the instigator has a personal interest or pecuniary right or liability therein; or to give or receive anything of value as an inducement for the prosecution of a suit, in any state or federal court or before any board or administrative agency within the state, against the Commonwealth, its departments, subdivisions, officers and employees; or to advise, counsel, or otherwise instigate the prosecution of such a suit against the Commonwealth; etc., unless the instigator has some interest in the subject or is related to or in a position of trust toward the plaintiff. Penalties for the violation of these statutes are provided.

The legislative history of these statutes to which we now refer conclusively shows that they were passed to nullify as far as possible the effect of the decision of the Supreme Court in *Brown* v. *Board of Education*, 347 U. S. 483 and 349 U. S. 294.

### Legislative History of Statutes in Suit

On May 17, 1954, the Supreme Court in *Brown* v. *Board of Education*, 347 U. S. 483, after argument and reargument, denounced the segregation of the races in public education as a violation of the equal protection clause of the Fourteenth Amendment, and requested the parties as well as the attorneys general of the affected states to

file briefs and present further argument to assist the court in formulating its decrees.[3]

On May 31, 1955, the Supreme Court, after further argument, reaffirmed its position, reversed the judgments below and remanded the cases to the lower courts to take such proceedings as should be necessary and proper to admit the parties to the public school on a racially non-discriminatory basis with all deliberate speed.[4]

Amongst the cases in the group considered by the Supreme Court was *Davis* v. *County School Board of Prince Edward County, Virginia*, which was instituted on May 23, 1951, on behalf of colored children of high school age in that county. The case had been tried by a three-judge district court after the Commonwealth of Virginia had been permitted to intervene. The court upheld the validity of the constitutional and statutory enactments of the state, which required the segregation of the races in the state schools, but found that the buildings, curricula and transportation furnished the colored children were inferior to those furnished the white children and ordered the defendants to remedy the defects with diligence and dispatch. 103 F. Supp. 337. As we have seen, this decision was reversed by the Supreme Court on the constitutional point and the duty to eliminate segregation was directly presented to the state authorities.[3] Their reaction is depicted in the following recital.

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[3] On the same day, in *Bolling* v. *Sharpe*, 347 U. S. 497, the Court held that segregation in the public schools in the District of Columbia is a denial of the due process clause of the Fifth Amendment.

[4] On remand; after the filing of numerous motions and the rendering of arguments thereon, the Court entered a decree enjoining racial discrimination in school admission but refused to set a time limit within which the Board should begin compliance, observing the likelihood of the schools being closed under state law. 149 F. Supp. 431. This refusal was reversed on appeal. *Allen* v. *County School Board of Prince Edward County, Va.* 4 Cir., — F. 2d —.

On August 30, 1954, the Governor of Virginia appointed the Gray Commission on Public Education, composed of thirty-two members of the General Assembly, and directed it to study the effect of the segregation decision and make such recommendations as might be deemed proper. The Commission submitted its final report to the Governor on November 11, 1955. Referring to prior decisions of the Supreme Court and to the non-judicial authority cited by it in support of the segregation decision, the Commission characterized the latter in the following terms:

> "With this decision, based upon such authority, we are now faced. It is a matter of the gravest import, not only to those communities where problems of race are serious, but to every community in the land, because *this decision transcends the matter of segregation in education.* It means that irrespective of precedent, long acquiesced in, the Court can and will change its interpretation of the Constitution at its pleasure, disregarding the orderly processes for its amendment set forth in Article V thereof. It means that the most fundamental of the rights of the states and of their citizens exist by the Court's sufferance and that the law of the land is whatever the Court may determine it to be by the process of judicial legislation."

The Commission's general conclusion was that "separate facilities in our public schools are in the best interest of both races, educationally and otherwise, and that compulsory integration should be resisted by all proper means in our power". To this end the Commission recommended that a special session of the General Assembly be called to authorize the holding of a constitutional convention in order to amend § 141 of the Constitution of Virginia which shortly before had been held by the Supreme Court of Appeals of Virginia in *Almond v. Day*, 197 Va. 419, to prohibit the payment of tuition and other expenses of students who may not desire to attend public schools. The Commission also recommended that legislation be passed

conferring broad discretion upon the school authorities to assign pupils in the public schools and to provide for the expenditure of State funds in the payment of tuition grants so as to prevent enforced integration. In response to this recommendation, the General Assembly, on December 3, 1955, meeting in Extra Session, enacted a bill submitting to the voters of the state the question whether such a convention should be held, and on January 9, 1956, the holding of the convention was approved by the voters.

On February 1, 1956, the General Assembly in its regular session adopted an "interposition resolution" by votes of 36-to-2 in the Senate and 90-to-5 in the House of Delegates. In this resolution the following declarations were included:

> "That by its decision of May 17, 1954, in the school cases, the Supreme Court of the United States placed upon the Constitution an interpretation, having the effect of an amendment thereto, which interpretation Virginia emphatically disapproves; . . .
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> "That with the Supreme Court's decision aforesaid and this resolution by the General Assembly of Virginia, a question of contested power has arisen: The court asserts, for its part, that the States did, in fact, in 1868, prohibit unto themselves, by means of the Fourteenth Amendment, the power to maintain racially separate public schools, which power certain of the States have exercised daily for more than 80 years; the State of Virginia, for her part, asserts that she has never surrendered such power;
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> "That this declaration upon the part of the Supreme Court of the United States constitutes a deliberate, palpable, and dangerous attempt of the court itself to usurp the amendatory power that lies solely with not fewer than three-fourths of the States; . . .
>
> "(That Virginia) . . . anxiously concerned at this massive expansion of central authority, is in duty bound to interpose against these most serious consequences, and earnestly to challenge the usurped authority that would inflict them upon her citizens. . . .

"And be it finally resolved, that until the question here asserted by the State of Virginia be settled by clear Constitutional amendment, we pledge our firm intention to take all appropriate measures honorably, legally and constitutionally available to us, to resist this illegal encroachment upon our sovereign powers, and to urge upon our sister States, whose authority over their own most cherished powers may next be imperiled, their prompt and deliberate efforts to check this and further encroachment by the Supreme Court, through judicial legislation, upon the reserved powers of the States."

The constitutional convention authorized by the voters was held on March 7, 1956, and amended § 141 of the constitution of the state in accordance with the recommendation of the Gray Commission.

On August 27, 1956, the General Assembly was convened in Extra Session in response to the call of the Governor of the State.[5] He made an opening address to the assembled lawmakers, in the course of which he said:

"The people of Virginia and their elected representatives, are confronted with the gravest problems since 1865. Beginning with the decision of the Supreme Court of the United States on May 17, 1954, there has been a series of events striking at the very fundamentals of constitutional government and creating situations of the utmost concern to all our people in this Commonwealth, and throughout the South.

"Because of the events I have just mentioned, I come before you today for the purpose of submitting recommendations to continue our system of segregated public schools * * *"

"The principal bill which I submit to you at this time defines State policy and governs public school appropriations accordingly. The declaration reads, in part, as follows:

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[5] Sec. 73 of the Virginia Constitution provides: "The Governor shall . . . recommend to (the General Assembly's) consideration such measures as he may deem expedient, and convene the General Assembly . . . when, in his opinion, the interest of the State may require."

> 'The General Assembly declares, finds and establishes as a fact that the mixing of white and colored children in any elementary or secondary public school within any county, city or town of the Commonwealth constitutes a clear and present danger * * * and that no efficient system of elementary and secondary public schools can be maintained in any county, city or town in which white and colored are taught in any such school located therein.'

"The bill then defines efficient systems of elementary and secondary public schools as those systems within a county, city or town in which there is no student-body, in the respective categories, in which white and colored children are taught. Following these definitions is this further declaration:

> "'The General Assembly for the purpose of protecting the health and welfares of the people and in order to preserve and maintain an efficient system of public elementary and secondary schools hereby declares and establishes it to be the policy of this Commonwealth that no public elementary or secondary schools in which white and colored children are mixed and taught shall be entitled to or shall receive any funds from the State Treasury for their operation, and, to that end, forbids and prohibits the expenditure of any part of the funds appropriated * * * for the establishment and maintenance of any system of public elementary or secondary schools, which is not efficient.'

"This policy is in harmony with § 129 of the State Constitution, which provides that 'The General Assembly shall establish and maintain an efficient system of public free schools throughout the state.' Manifestly, integration of the races would make impossible the operation of an efficient system. By this proposed legislation, the General Assembly, properly exercising its authority under the Constitution, will clearly define what constitute an efficient system for which State appropriations are made."

The purpose for which the Extra Session was called was emphasized in the following exhortation with which the Governor concluded his address:

> "The proposed legislation recognizes the fact that this is the time for a decisive and clear answer to these questions:
>
> "(1) Do we accept the attempt of the Supreme Court of the United States, without constitutional or any other legal basis, to usurp the rights of the States and dictate the administration of their internal affairs? (2) Do we accept integration? (3) Do we want to permit the destruction of our schools by permitting 'a little integration' and witness its subsequent sure and certain insidious spread throughout the Commonwealth? My answer is a positive 'No'. On the other hand, shall we take all appropriate measures honorably, legally and constitutionally available to us, to resist this illegal encroachment upon our sovereign powers? My answer is a definite 'Yes' and I believe it is to be the answer of the vast majority of the white people of Virginia, as well as the answer of a large, if unknown, number of Negro citizens."

The Legislature responded at once to the Governor's appeal. The principal bill to which he referred in his address became Chapter 71 of the Acts passed at the Extra Session. It appropriated funds for the maintenance of the elementary and secondary schools of the state for the ensuing biennium and included the declarations above set out, whereby the use of the funds for integrated schools are prohibited. An accompanying Act, Chapter 70, known as the Pupil Placement Act, requires each pupil to attend his present segregated school unless a transfer is authorized by a Pupil Placement Board appointed by the Governor; and the Board is required to consider the effect of its decisions upon the efficiency of the schools which, according to the declarations of the Legislature, can be maintained only by preserving segregation of the races. A review of the decisions of the Board is provided through a cumbersome and costly procedure. Another companion

statute, Chapter 68, provides that if children of both races are enrolled in the same school by any school authorities acting voluntarily or under the compulsion of an order of court, the school shall be closed and removed from the public school system and the control of the school shall be vested in the state and not reopened until the Governor finds that it can be done without enforced integration.

The Pupil Placement Act was considered at length and held unconstitutional by this court in *Adkins v. School Board of the City of Newport News*, 148 F. Supp. 430, wherein the terms of the Act are set out in full and the legislative history is reviewed. The opinion of the court pointed out that the administrative remedy afforded to an aggrieved person by the Act would consume at least 165 days between the filing of the protest and the final decision which was lodged in the hands of the Governor. On appeal the judgment of the District Court was affirmed, 246 F. 2d 325, cert. den. — U. S. —.

### Effect of Passage of Statutes in Suit

It was in this setting[*] that the Acts now before the court were passed as parts of the general plan of massive re-

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[*] While it is well settled that a court may not inquire into the legislative motive (*Tennev v. Brandhove*, 341 U. S. 367, 377), it is equally well settled that a Court may inquire into the legislative purpose. (See *Baskin v. Brown*, 4 Cir., 174 F. 2d 391, 392-393, and *Davis v. Schnell*, 81 F. Supp. 872, 878-880, aff'd 336 U. S. 933, in which state efforts to disenfranchise Negroes were struck down as violative of the Fifteenth Amendment.) Legislative motive—good or bad—is irrelevant to the process of judicial review; but legislative purpose is of primary importance in determining the propriety of legislative action, since the purpose itself must be within the legislative competence, and the methods used must be reasonably likely to accomplish that purpose. Because of this necessity, a study of legislative purpose is of the highest relevance when a claim of unconstitutionality is put forward. Usually a court looks into the legislative history to clear up some statutory ambiguity, as in *Davis v. Schnell*, 81 F. Supp. at 878; but such ambiguity is not the *sine qua non* for a judicial inquiry into legislative history. See the decision in *Lane v. Wilson*, 307 U. S. 268, in which the Supreme Court showed that the state statute before the court was merely an attempt to avoid a previous decision in which the "grandfather" clause of an earlier statute had been held void.

sistance to the integration of schools of the state under the Supreme Court's decrees. The agitation involved in the widespread discussion of the subject and the passage of the statutes by the Legislature have had a marked effect upon the public mind which has been reflected in hostility to the activities of the plaintiffs in these cases. This has been shown not only by the falling off of revenues, indicated above, but also by manifestations of ill will toward white and colored citizens who are known to be sympathetic with the aspirations of the colored people for equal treatment, particularly in the field of public education. A number of white citizens who attempted to give aid to the movement by speaking out on behalf of the colored people, or by taking membership in the Association, or joining the complainants in school suits, have been subjected to various kinds of annoyance. When their names appeared in the public press in connection with these activities they were besieged day and night by telephone calls which were obscene, threatening, abusive, or merely silent interruptions to the peace and comfort of their homes. Letters and telegrams of like nature were also received. Some of these persons found themselves cut by their friends and made unwelcome where they had formerly been received with kindness and respect. Two crosses were burned near the homes of two of them; an effigy was hung in the yard of a white plaintiff in a school case, and a hearse was sent to the home of the colored president of the Norfolk branch of the Association during his absence "to pick up his body." The last mentioned person was also chairman of the local branch of a labor union and a man of prominence in his community. He had been active and successful in directing membership campaigns for the Association in prior years but in 1957 he found that the solicitors were unwilling to continue their work. Colored lawyers on the State Conference legal staff were assailed with fear that enforcement of the statutes now before this court would result in loss of their licenses to practice

should they continue their activities on the Association's behalf. Numerous newspaper articles offered in evidence show that the proposal to integrate the schools was a prime subject of public interest and discussion throughout the state. They are received over objections by the defendants only as evidence of this fact and not to prove the accuracy of the statements therein contained. In view of all the evidence, we find that the activities of the State authorities in support of the general plan to obstruct the integration of the races in schools in Virginia, of which plan the statutes in suit form an important part, brought about a loss of members and a reduction of the revenues of the Association and made it more difficult to accomplish its legitimate aims.

The defendants on their own behalf produced as witnesses six of the plaintiffs in the Prince Edward County school case. All of them had been visited by representatives of the Boatwright Committee of the Legislature, which had been created by Chapter 34 of the Acts passed at the Extra Session, and had been authorized to make a thorough investigation into the activities of corporations or associations which seek to influence, encourage or promote litigation relating to racial activities in the State. These witnesses testified either that they did not know that they were parties to the Prince Edward suit or that they merely wanted better schools for their children and did not want integrated schools. They also testified that they suffered no mistreatment by reason of their names being used as plaintiffs in the suit. The evidence, however, shows that the first step leading to the litigation in Prince Edward County was a strike of the children in the colored high school who refused to attend classes for a period of two weeks as a protest against the undesirable conditions in the school. After the strike there were meetings of the parents in the school building and in the nearby Baptist Church which were addressed by lawyers of the legal staff of the Virginia State Conference of the Associa-

tion, who were in attendance at the request of the parents of the children, as well as by other persons. The speakers expressed the opinion that in order to secure fair treatment for the colored pupils it would be necessary to institute a suit for the establishment of an integrated school. It was further shown that each of the six witnesses had signed a paper authorizing Hill, Martin and Robinson, attorneys, to act for and on behalf of them and their children to secure such educational opportunities as they might be entitled to under the Constitution and laws of the United States and to represent them in all suits of whatever kind pertaining thereto. The record in the Prince Edward case shows that 186 persons were joined as parties plaintiff.

The Attorney General of Alabama testified as to racial disturbances and disorders in 1955 and 1956 arising in his State in connection with the attempt to enroll colored students in white schools and involving acts of violence and personal injury to colored persons. He attributed these activities in large part to white men associated in a splinter organization of the Ku Klux Klan and expressed the opinion that the registration of members of the organization under an act like Chapter 32 in this case would aid in the identification and successful prosecution of the offenders. Similarly he thought it would be helpful to require the registration of members of a Negro organization in Tuskegee, which succeeded in some measure to the work of the N. A. A. C. P. after it had been enjoined from operating in Alabama and had engaged in boycotting white merchants in the community and for this purpose had engaged in threats and acts of intimidation. The Attorney General conceded that he was hostile to the N. A. A. C. P. and had filed suit against it in his State demanding a list of its members, but that he had not filed such suit against the Ku Klux Klan.

The Sheriffs of four southside Virginia counties in which the negro population ranges from 45 per-cent to 54

per-cent and in one instance to 77 per-cent of the total, testified that the relation of the races in their jurisdictions was good but that in their opinion integration in the public schools would result in disturbances and, perhaps, in bloodshed; and that a list of persons active in racial matters would aid them in preserving the peace and in selecting deputies to enforce the law. We find that the opposition to integration in the public schools is especially strong in this section of Virginia. The Superintendent of the Virginia State Police agreed with the opinion that lists of persons active in racial matters would help law enforcement even though the lists might contain thirteen or fourteen thousand names.

A representative of the law department of the Association of American Railroads testified for the defendants that through investigations he had become familiar with the solicitation of personal injury claims by attorneys, and generally with the offenses of barratry and running and capping; and that such activities occur in Virginia and that the information required to be filed under Chapter 31 of the Acts of the Extra Session would be helpful in investigating such activities.

Mr. C. Harrison Mann, Jr., a lawyer and a delegate to the General Assembly, testified on behalf of the defendants that he was the chief patron of the Acts of Legislature now in suit and that he was moved by two purposes in connection with the legislation. He was alarmed at the activities of a white leader who is violently fighting integration in the eastern part of the United States and was operating in Washington shortly before the Extra Session convened. It was the opinion of the witness that these activities would lead to racial tension and possibly violence and that it was highly desirable that the identities of the responsible people be made known by registration. With respect to the passage of the Acts relating to the practice of law in Virginia, the delegate was influenced by reports in the press that certain persons were joined

as plaintiffs in the Prince Edward suit without knowledge that integration of the races in the schools was at issue and that in other parts of the country there were reports that the Association was soliciting the institution of suits by plaintiffs and practicing law, which he considered to be a breach of legal ethics and bad public policy. He also gave evidence that he was subject to abuse from various sources by reason of his activities.

### Defendants' Motion to Dismiss

#### *Civil Rights of Corporations*

After the institution of the pending suits the defendants filed motions to dismiss in each case on the ground that the complaints did not state a controversy over which the court had jurisdiction. The motions were dismissed after argument and the defendants were required to answer with leave to renew the contention after the hearing on the evidence. They now dispute the jurisdiction of the Court, first, on the ground that a corporation is not a person entitled to bring suit for deprivation of rights, privileges or immunities granted by the Constitution or laws of the United States under 42 U. S. C. 1983, over which jurisdiction is conferred upon the district courts by 28 U. S. C. § 1343(3). It is pointed out that these sections are derived from the Civil Rights Act of 1871, which was enacted to give effect to the provisions of the Fourteenth Amendment and thereby to prevent the deprivation of the rights of natural persons under the color of any state law. Reliance is placed chiefly on the concurring opinion of Justice Stone in *Hague* v. *C. I. O.*, 307 U. S. 496, where suit was brought by individual citizens and a membership corporation who claimed that under an ordinance of Jersey City they were deprived of the privilege of free speech and free assembly secured to them as citizens of the United States by the Fourteenth Amendment. The ordinance was held unconstitutional as an undue restriction of these rights and

relief was granted to the individual plaintiffs but denied to a corporate plaintiff for the reason expressed in the opinion of Justice Roberts (page 514) that "natural persons and they alone are entitled to the privileges and immunities which Section 1 of the Fourteenth Amendment secures for citizens of the United States". This holding that corporations are not "citizens" within this clause of the Fourteenth Amendment is not disputed; but Justice Stone, who concurred in the judgment but differed with the reasons expressed by his colleagues, wrote a separate opinion in which he went further and made the following statement (page 527):

> "Since freedom of speech and freedom of assembly are rights secured to persons by the due process clause, all of the individual respondents are plainly authorized by § 1 of the Civil Rights Act of 1871 to maintain the present suit in equity to restrain infringement of their rights. As to the American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons. *Northwestern Life Ins. Co.* v. *Riggs*, 203 U. S. 243, 255; *Western Turf Assn.* v. *Greenberg*, 204 U. S. 359, 363."

This pronouncement supports the defendants' position but it cannot be said to be a controlling authority since it did not represent the views of the majority of the Court but was concurred in only by Justice Reed (see *City of Manchester* v. *Leiby*, 1 Cir., 177 F. 2d 661, 663, 664).

It is of more importance to note that the opinion of Justice Stone did not discuss the prior decision of the Court in *Grosjean* v. *American Press Co.*, 297 U. S. 233, where a license tax on advertisement was held invalid at the suit of a newspaper corporation. The Court held (page 244) that freedom of speech and of the press are fundamental rights safeguarded by the due process of law clause of the Four-

teenth Amendment against abridgement by state legislation, and although a corporation is not a *citizen* within the meaning of the privileges and immunities clause, it is a *person* within the meaning of the equal protection and due process clause of that amendment. In other words, the corporation was accorded rights to which it would not have been entitled if the rule announced by Justice Stone had been applied.

Subsequent cases have extended this broad interpretation of the word "person" in the Civil Rights Act and have held that a corporation is a person within that Act entitled to challenge the deprivation of rights under color of a state statute to which a money valuation could not be applied. Thus in *McCoy* v. *Providence Journal Co.*, 1 Cir., 190 F. 2d 760, it was held that a newspaper corporation, as well as individual persons employed by the corporation, were entitled to bring suit under 28 U. S. C. 1343(3) to secure the right to inspect public records which had been denied them by municipal authority; and in *Watchtower Bible and Tract Co.* v. *Los Angeles County*, 9 Cir., 181 F. 2d 739, it was held that the District Court had jurisdiction to entertain a complaint of a corporation engaged in the circulation of religious literature that it had been subjected to an unconstitutional tax. Both of these decisions relied upon the pronouncement of the Supreme Court in *Grosjean* v. *American Press Co.*, supra, and we are in accord with their conclusions. It is true that the Fourteenth Amendment as well as the Civil Rights statutes were enacted for the purpose of securing colored persons against unjustifiable discrimination, but in the development of the law the protection afforded by the Amendment has not been confined to natural persons, and there is no reasonable ground at this time to deny the protection afforded by the Civil Rights Act to corporations which are engaged through their agents in public speech and in the circulation of literature designed to protect the rights of natural persons in whose interest the enactments were originally passed. In these

days, when corporate organization is wellnigh necessary for the conduct of large enterprises, the propriety of including them within the protection of the Act would seem to be obvious; and since the word "person" in the Fourteenth Amendment has been broadly construed to include corporations in the protection of their property rights,[7] there is no good reason why the same liberality of interpretation should not be used when the corporation is formed not for purposes of profit but for the protection of the liberties of the individuals.

JURISDICTIONAL AMOUNT

Secondly, the defendants contest the right of the plaintiffs to obtain relief in this court under 28 U. S. C. §§ 1331 and 1332 which confer upon the district courts jurisdiction over civil actions arising under the Constitution and laws of the United States and civil actions between citizens of different states, where the matter in controversy exceeds the sum of $3,000.00 exclusive of interest and costs. The contention is that the plaintiffs did not allege in their complaints or prove at the hearing sufficient facts to establish the jurisdictional amount. In substance the evidence shows that the membership of the Association in Virginia dropped from 19,436 for the first eight months of 1956, prior to the passage of the statutes in suit, to 13,595 in the first eight months of 1957, after the enactments. In the same period the income of the Association in Virginia showed a decline from $43,612.75 to $37,470.00, and its national income a decline from $598,612.84 for the year 1956 to $425,608.13 for

[7] See *Pennekamp* v. *Florida*, 328 U. S. 331 and *Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, in each of which the Court upheld the right of a business corporation to freedom of speech and freedom of the press. It seems illogical and meaningless to deny the same rights to a nonprofit corporation organized to protect the freedoms of natural persons since the latter may always be properly joined as parties plaintiff in suits brought by the corporation on their behalf. See 66 Yale Law Journal 545, 548.

the first eight months of 1957. The Fund also experienced losses in these periods. Its income rose steadily until 1956, when it became $351,283.32 although its operations in Texas were restrained in September by an order of court. Its income dropped in the subsequent period, as is shown by contrasting its income of $180,000.00 for the first eight months of 1957 with its income of $246,000.00 for the same period of 1956. In Virginia, its income dropped from $1,859.20 for 1956 to $424.00 during the first eight months of 1957.

When suit is brought for an injunction to restrain the enforcement of a regulatory statute alleged to be invalid because of its continuing harmful effect upon the plaintiff the jurisdiction of the court is to be tested by the value of the object to be gained. Failure to prove that a sufficient amount of damage has already been sustained will not defeat the remedy if the injury is recurrent or continuous, since the advantage to be gained by the complainant from removal of the burden imposed by the statute is the matter in controversy. *Glenwood Light & Water Co.* v. *Mutual L. H. & P. Co.*, 239 U. S. 121, 125, 126; *Gibbs* v. *Buck*, 307 U. S. 66, 74; *American R. Co.* v. *South Porto Rico Sugar Co.*, 1 Cir., 293 Fed. 670, 673; cf. *McNutt* v. *General Motors Accept. Corp.*, 298 U. S. 178, 181; *KVOS* v. *Associated Press*, 299 U. S. 269, 277. Hence the inquiry in the pending suits is not limited to the immediate effect upon the plaintiffs to be expected from the enforcement of the Virginia statutes but extends to the loss likely to flow from their enforcement throughout the years. Nor is the inquiry limited to the impact of the statutes upon the plaintiffs' business in Virginia, because the registration statutes, Chapters 31 and 32, are not confined to business done in Virginia, but require both plaintiffs to disclose the details of their business throughout the country including a list of all members, all contributions, and all expenditures; and Chapters 33, 35 and 36, relating to the practice of law, forbid the plaintiffs to pay the costs and expenses of class suits to

which most of the contributions received by the Fund in its recurrent national campaigns are devoted. Taking these facts into consideration, it is manifest that the existence of the required jurisdictional amount is established in each of the cases before the court.

Certainly it cannot be said that the claim of loss in excess of the jurisdictional amount was made by the plaintiffs in bad faith for the purpose of conferring jurisdiction, or that it has been shown to a legal certainty that less than the amount is involved in the pending suits; and hence the plaintiffs have met the test laid down in the following excerpt from *St. Paul Indemnity Co. v. Cab Co.*, 303 U. S. 283, 288-290:

> "The intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts. The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction. Nor does the fact that the complaint discloses the existence of a valid defense to the claim. But if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed, or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed. Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction."

RESTRAINT OF CRIMINAL PROSECUTION

The defendants also invoke the familiar rule that ordinarily a court of equity will not restrain a criminal prosecution based on a state statute, even if the constitutionality of the statute is involved, since this question can be raised and settled in the criminal case with review by the higher courts as well as in a suit for injunction. *Douglas* v. *Jeannette*, 319 U. S. 157, 163, 164; and this is especially true where the only threatened action is a single prosecution of an alleged violation of state law. However, it is also well recognized that a criminal prosecution may be enjoined under exceptional circumstances where there is a clear showing of danger of immediate irreparable injury. *Spielman Motor Co.* v. *Dodge*, 259 U. S. 89, 95; *Beal* v. *Missouri Pacific R. Corp.*, 312 U. S. 45, 49. It is obvious that the present case falls in the latter category. The penalties prescribed by the statutes are heavy and they are applicable not only to the corporation but to every person responsible for the management of its affairs, and under Chapter 32 of the statutes each day's failure to register and file the required information constitutes a separate punishable offense. The deterrent effect of the statutes upon the acquisition of members, and upon the activities of the lawyers of the plaintiffs under the threat of disciplinary action has already been noted, and the danger of immediate and persistent efforts on the part of the state authorities to interfere with the activities of the plaintiffs has been made manifest by the repeated public statements. The facts of the cases abundantly justify the exercise of the equitable powers of the court. *Ex parte Young*, 209 U. S. 123, 147; *Truax* v. *Raich*, 239 U. S. 33; *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165; *Sterling* v. *Constantin*, 287 U. S. 378.

PRIOR CONSTRUCTION OF STATUTES BY STATE SUPREME COURT

Finally, the defendants urge that we should not exercise the power to restrain the enforcement of the state statute but should withhold action until the statutes have been construed by the Supreme Court of Appeals of Virginia. This contention is based on the policy defined in decisions of the Supreme Court of the United States that the federal courts should avoid passing on constitutional questions in situations where an authoritative interpretation of state law may avoid the constitutional issues. Hence if the interpretation of a state statute is doubtful or a question of law remains undecided, the federal court should hold its proceedings in abeyance for a reasonable time pending construction of the statute by the state courts or until efforts to obtain such an adjudication have been exhausted. See *Spector Motor Co. v. McLaughlin*, 323 U. S. 101; *Government & Civic Employees Organ. Com. v. Windsor*, 347 U. S. 901 and 353 U. S. 364; *Shipman v. Dupre*, 339 U. S. 321.

These rulings, however, do not mean that the federal courts lose jurisdiction in cases where the state courts have not passed upon the statute under attack or that the federal court is powerless to take any action until a decision by the state court has been rendered. Such a conclusion could not be reached in the pending case since the federal statutes expressly confer jurisdiction upon the federal courts where civil rights have been violated (42 U. S. C. §1983), or where federal questions are involved (28 U. S. C. § 1331). Thus in *Doud v. Hodge*, 350 U. S. 485, where the constitutionality of a licensing and regulatory statute was involved and jurisdiction of the federal court was invoked under 28 U. S. C. § 1331, the Court said (page 487):

> "• • • This Court has never held that a district court is without jurisdiction to entertain a prayer for an injunction restraining the enforcement of a

state statute on grounds of alleged repugnancy to the Federal Constitution simply because the state courts had not yet rendered a clear or definitive decision as to the meaning or federal constitutionality of the statute.

"We hold that the District Court has jurisdiction of this cause. It was error to dismiss the complaint for lack of jurisdiction. The judgment of the District Court is vacated and the case is remanded to it. We do not decide what procedures the District Court should follow on remand."

See also *A. F. of L.* v. *Watson*, 327 U. S. 582, 599, where, in directing a district court to retain a suit involving the constitutionality of a state statute pending the determination of proceedings in the state courts, the Supreme Court said that the purpose of the suit in the federal court would not be defeated by this action, since the resources of equity are adequate to deal with the problem so as to avoid unnecessary friction with state policies while cases go forward in the state courts for an expeditious adjudication of state law questions.

The policy laid down by the Supreme Court does not require a stay of proceedings in the federal courts in cases of this sort if the state statutes at issue are free of doubt or ambiguity. See the opinion of Judge Parker in *Bryan* v. *Austin*, E. D. S. C., 148 F. Supp. 563, 567-568, where it was said:

"I recognize, of course, that, in the application of the rule of comity, a federal court should stay action pending action by the courts of a state, where it is called upon to enjoin the enforcement of a state statute which has not been interpreted by the state courts, and where the statute is susceptible of an interpretation which would avoid constitutional invalidity. As the federal courts are bound by the interpretation placed by the highest court of a state upon a statute of that state, they should not enjoin the enforcement of a statute as violative of the Con-

> stitution in advance of such an interpretation, if it is reasonably possible for the statute to be given an interpretation which will render it constitutional. . . . The role as to stay of proceedings pending interpretation of a state statute by the courts of the state can have no application to a case, such as we have here, where the meaning of the statute is perfectly clear and where no interpretation which could possibly be placed upon it by the Supreme Court of the state could render it constitutional."

We are not unmindful of the necessity of maintaining the delicate balance between state and federal courts under the concept of separate sovereigns. We agree that the constitutionality of state statutes requiring special competence in the interpretation of local law should not be determined by federal courts in advance of a reasonable opportunity afforded the parties to seek an adjudication by the state court. With these basic principles we find no fault.

It must be remembered, however, that Congress has not seen fit to restrict the jurisdiction of the district courts by imposing as a condition precedent to action by the federal courts, the judicial pronouncement by the state court in cases where the constitutionality of a state statute is presented and injunctive relief is requested. Concurrent jurisdiction still exists until modified in the wisdom of the legislative branch of our government.

Neither are we given any clear formula to follow under the decisions of the Supreme Court. The more recent decisions of the highest court suggest that statutory three-judge courts should be hesitant in exercising jurisdiction in the absence of state court action, or at least a reasonable opportunity to secure same. It is apparent to us that the Supreme Court has endeavored to grant cautious discretion to district courts in determining whether jurisdiction should be exercised and the matter considered on its merits, as contrasted with the acceptance of jurisdiction as such. Should this court exercise such jurisdiction under the facts

and circumstances of this case, bearing in mind the importance of the questions presented?

We are advised that Virginia is not alone in enacting legislation seriously impeding the activites of the plaintiff corporations through the passage of similar laws (43 Va. L. Rev. 1241). As heretofore noted, the problem for determination is essentially a federal question with no peculiarities of local law. Where the statute is free from ambiguity and there remains no reasonable interpretation which will render it constitutional, there are compelling reasons to bring about an expeditious and final ascertainment of the constitutionality of these statutes to the end that a multiplicity of similar actions may, if possible, be avoided.

CONSTITUTIONALITY OF CHAPTERS 31 AND 32

This discussion brings us at last to a consideration of the attack made on the constitutionality of the statutes in their bearing upon the activities of the plaintiffs. The two registration statutes, Chapters 31 and 32, are free from ambiguities which require a prior interpretation by the courts of the state and hence the obligation to pass on the question of constitutionality cannot be avoided.

Chapter 32 is the more sweeping of the two. Section 1 declares that harmonious relations between the races are essential to the welfare, health and safety of the people of Virginia and that it is the duty of the government to exercise all available means to prevent conditions which impede the peaceful co-existence of all the peoples in the state, and that therefore it is vital to the public interest that information be obtained with respect to persons or corporations whose activities may cause interracial tension or unrest.

Section 2* of Chapter 32 requires the registration of any person who in concert with others engages as one of his principal activities (1) in promoting or opposing in any manner the passage of legislation by the General Assembly, in behalf of any race or color, or (2) in advocating racial integration or segregation; and the statute also requires the registration of any person, (3) whose activities cause or tend to cause racial conflict or violence, or (4) who is engaged in raising or expending funds for the employment of counsel or the payment of costs in connection with racial litigation.

*"§ 2. Every person, firm, partnership, corporation, or association, whether by or through its agents, servants, employees, officers, or voluntary workers or associates, who or which engages as one of its principal functions or activities in the promoting or opposing in any manner the passage of legislation by the General Assembly in behalf of any race or color, or who or which has as one of its principal functions or activities the advocating of racial integration or segregation or whose activities cause or tend to cause racial conflicts or violence, or who or which is engaged or engages in raising or expending funds for the employment of counsel or payment of costs in connection with litigation in behalf of any race or color, in this State, shall, within sixty days after the effective date of this act and annually within sixty days following the first of each year thereafter, cause his or its name to be registered with the clerk of the State Corporation Commission, as hereinafter provided; provided that in the case of any person, firm, partnership, corporation, association or organization, whose activities have not been of such nature as to require it to register under this act, such person, firm, partnership, corporation, association or organization, within sixty days following the date on which he or it engages in any activity making registration under this act applicable, shall cause his or its name to be registered with the clerk of the State Corporation Commission, as hereinafter provided; and provided, further, that nothing herein shall apply to the right of the people peaceably to assemble and to petition the government for a redress of grievances, or to an individual freely speaking or publishing on his own behalf in the expression of his opinion and engaging in no other activity subject to the provisions hereof and not acting in concert with other persons."

The Association is admittedly engaged in activities (1), (2) and (4) and the defendants have offered evidence tending to show that these activities, if successful in bringing about integration, would cause racial conflicts and violence. The Fund is engaged in activities (2) and (4).

The sort of registration required by Chapter 32 has a definite bearing upon the validity of the enactment, since a statement of the business of the registrant in much detail is prescribed. The registrant, if a corporation, is required by § 3 of the statute to file a statement showing amongst other things the business address of all of its offices, the purpose for which it was formed, a copy of its charter, the names of its principal officers, and the names and addresses of all of the persons through whom it carries on its activities in the state, a list of its members and their addresses, a financial statement of assets and liabilities, an itemized list of its contributions and other income during the preceding year, and a list of its expenditures in detail.

Section 3 provides that, at the time of registration, information as to the preceding year shall be furnished under oath as to the source of any funds received or expended for the purposes set forth in § 2, including the name and address of each contributor and an itemized statement of expenditures, and also, if the registrant is a corporation, a list of its members in the state and their addresses and a financial statement showing the assets and liabilities, the source of its income, itemizing contributions and the sources thereof, and a list of expenditures in detail.

Section 5 makes it a misdemeanor for any person to engage in the activities described in § 2 without registration, punishable, in the case of a corporation, by a fine not exceeding $10,000.00, each day's failure to register constituting a separate offense and punishable as such.

Section 6 provides that any person failing to comply with the Act may be enjoined from continuing its activities by any court of competent jurisdiction.

Section 9 excepts from the Act newspapers, periodicals, magazines or other like means admitted as second class matter in the United States Post Office, as well as radio, television, facsimile broadcast or wire service operations. Also excepted are persons or associations in a political election campaign or persons acting together because of activities connected with political campaigns.

Undoubtedly the burden of supplying these statements imposed upon persons who engage in activities (1) and (2) constitutes a restriction upon the right of free speech which, as we have seen, the Association is entitled to exercise. Hence the question arises whether the statute is within the police powers which, in the past, have been properly exercised in many fields.[9] The defendants point out that the promoting or opposing passage of legislation covered by clause (1) may involve lobbying, which has long been recognized as a proper subject of regulation by the state and federal governments. Thus it was decided in *United States* v. *Harriss*, 347 U. S. 612, by a divided court, that the registration provisions of the Federal Regulation of Lobbying Act did not violate freedom of speech, provided the scope of the Act was limited to persons who had solicited or received contributions to influence or defeat the passage of legislation and who intended to accomplish this purpose

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[9] Among the authorities cited by the defendants were cases upholding regulation by registration applicable to vocational activities (*United States* v. *Harriss*, 347 U. S. 612 (1954) and *United States* v. *Slaughter*, 89 F. Supp. 205 (1950) on lobbyists; *Viereck* v. *United States*, 318 U. S. 236 (1943) and *United States* v. *Peace Information Center*, 97 F. Supp. 255 (1951) on foreign agents), subversion (*Communist Party* v. *Subversive Activities Control Board*, D. C. Cir., 223 F. 2d 531 (1954) and *Albertson* v. *Millard*, 106 F. Supp. 635 (1952)), and presidential election activities (*Burroughs* v. *United States*, 290 U. S. 534 (1934)). Cases involving Congressional control of the second class mailing privilege (*Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288 (1913)), and state control over fraternities in state schools (*Waugh* v. *Mississippi University*, 237 U. S. 589 (1915) and *Webb* v. *State University of New York*, 125 F. Supp. 910 (1954) are also cited.

through direct communication with members of Congress. The plain implication of the decision, as appears clearly from the dissenting opinions, is that unless the Act were so limited it would be an unwarranted interference with the right of free speech. The lobbying statute of the State of Virginia, §§ 32-20 to 30-28, is likewise limited to those who employ a person to promote or oppose the passage of an act of the General Assembly and to a person accepting such employment. Such a person is required to register his name upon a legislative docket.

The terms of clause (1) of § 2 of the Act contain no such limitation. They apply to any person whose principal activities include "the promoting or opposing *in any manner* the passage of legislation by the General Assembly," excepting however, by § 9 of the Act, newspapers and similar publications, communications by radio and television, and persons engaged in a political election campaign. Hence the duty to register is imposed upon anyone who in concert with others merely speaks or writes on the subject, even if he has had no contact of any kind with the legislative body and has neither received nor spent any money to further his purpose. The discriminating and oppressive character of the provision is emphasized by the exemption of persons engaged in a political election campaign who are free to speak without registration, whereas, persons having no direct interest in elections as such and concerned only with securing equal rights for all persons are covered by the statute. Manifestly so broad a restriction cannot be held valid under the ruling of *United States* v. *Harriss*, *supra*.

The terms of clause (2) impinge directly upon the field of free speech for they apply to anyone, with the same exceptions, whose present activities include "the advocacy of racial integration or segregation," and so the same problem of the extent of regulatory power is presented. It must be borne in mind in considering the question that the

prohibition against laws abridging the freedom of speech, press and assembly contained in the First Amendment is not absolute, for, as was said in *Communications Assn. v. Douds*, 339 U. S. 382, 394, "it has long been established that these freedoms themselves are dependent upon the power of constitutional government to survive." Consequently in that case the non-Communist affidavits required by the Labor Management Relations Act were upheld even though the situation did not meet the clear and present danger tests laid down in Schenck v. United States, 249 U. S. 47; and in Dennis v. United States, 341 U. S. 494, the clear and present danger test was applied in upholding a conviction under the Smith Act, which made it a crime to organize a group which knowingly and wilfully advocates the violent overthrow of the Government of the United States.

The defendants insist that Chapter 32 was enacted for the commendable purpose of protecting the public welfare and safety and therefore should be upheld. They point to the declaration of the policy in the preamble of the statute to eliminate all conditions which impede the peaceful coexistence of all persons in the state and which, according to the testimony of law enforcement officers, is threatened by the effort to establish integration of the races in the public schools. Great dependence is placed upon the decision of the Supreme Court in *Bryant* v. *Zimmerman*, 278 U. S. 63 (1928), which is described as the leading case in this field most pertinent to the matter now before the court. The Supreme Court upheld a New York statute, aimed at the activities of the Ku Klux Klan, which required associations having an oath-bound membership to file lists of their members and officers with a State officer and made it a crime for members to attend meetings knowing that the registration requirement had not been complied with. It was held that the statute as applied to a member of the Ku Klux Klan would not violate the due process clause of the Fourteenth Amendment since the state, for its own protection, was entitled to the disclosure as a deterrent to violations

of the law; and also that there was no denial of equal protection in excepting labor unions, Masons and other fraternal bodies from the statutes, since there was a tendency on the part of the Ku Klux Klan to shroud its acts in secrecy and engage in conduct inimical to the public welfare.

We do not think that these decisions justify the restriction upon public discussion which Chapter 32 imposes upon the plaintiffs in this case. Obviously the purpose and effect of a regulatory act must be examined in each case in light of the existing situation. In the present instance the executive and legislative officers of the state have publicly and forcibly announced their determination to impede and, if possible, to prevent the integration of the races by all lawful means; and the statutes passed at the Extra Session were clearly designed to cripple the agencies that have had the greatest success in promoting the rights of colored persons to equality of treatment in the past, and are possessed of sufficient resources to make an effort at this time to secure the enforcement of the Supreme Court's decree. The statute is not aimed, as the act considered in *Bryant* v. *Zimmerman*, at curbing the activities of an association likely to engage in violations of the law, but at bodies who are endeavoring to abide by and enforce the law and have not themselves engaged in acts of violence or disturbance of the public peace.

The Act is not saved, in so far as the plaintiffs are concerned, by making it applicable to advocates of both sides of the dispute so that it requires a disclosure of the names of persons who may be led to acts of violence by reason of their hostility to integration. Such a provision does not lead to equality of treatment under the circumstances known by the Legislature to prevail. Registration of persons engaged in a popular cause imposes no hardship while, as the evidence in this case shows, registration of names of persons who resist the popular will would lead not only to expressions of ill will and hostility but to the loss of members by the plaintiff's Association.

Nor can the statute be sustained on the ground that breaches of peace may occur if integration in the public schools is enforced. The same contention was made in *Buchanan* v. *Warley*, 245 U. S. 60, where the court struck down an ordinance of the City of Louisville which forbade colored persons to occupy houses in blocks occupied for the most part by white persons. The court rejected the contention that the prohibition should be sustained on the ground that it served to diminish miscegenation and to promote the public peace by averting race hostility. See pages 73-74:

> "This drastic measure is sought to be justified under the authority of the State in the exercise of the police power. It is said such legislation tends to promote the public peace by preventing racial conflicts; that it tends to maintain racial purity; that it prevents the deterioration of property owned and occupied by white people, which deterioration, it is contended, is sure to follow the occupancy of adjacent premises by persons of color.
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> "The authority of the State to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety and welfare is very broad as has been affirmed in numerous and recent decisions of this court. Furthermore, the exercise of this power, embracing nearly all legislation of a local character, is not to be interfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose. But it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution; that principle has been so frequently affirmed in this court that we need not stop to cite the cases."

This comment strikes home with peculiar force to the situation in Virginia where the attitude of the public authorities openly encourages opposition to the law of the land, which may easily find expression in disturbances of

the public peace. That which was said in *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250, in respect to a state license tax imposed on the owners of newspapers is pertinent here:

> "* * * the tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

For our purpose it is of special significance that in *Thomas* v. *Collins*, 323 U. S. 516, the Supreme Court held invalid a statute which required a union organizer merely to register and secure an organizer's card from a state officer before soliciting membership in a labor union in a public speech. It was said "that as a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with the exercise of free speech and free assembly." The greater burden of the registration statutes in suit is manifest.

The terms of clause (3) of § 2 of the statute requiring registration of anyone whose activities cause or tend to cause racial conflicts or violence require little discussion. They are so vague and indefinite that the clause taken by itself does not satisfy the constitutional requirement that a criminal statute must give to a person of ordinary intelligence fair notice of the kind of conduct that constitutes the crime, *United States* v. *Harris*, 347 U. S. 612.

Clause (4) of Chapter 32 requires the registration of anyone who engages in raising or expending funds for the employment of counsel or the payment of costs in connection with litigation on behalf of any race or color. In connection with other provisions contained in Chapters 31,

33, 35 and 36 relating to litigation, it constitutes an important part, perhaps the most important part, of the plan devised by the state authorities to impede or to prevent the integration of the races in the schools of the state; and it subjects the participant to all of the details of registration above described.

In its broad coverage the statute applies to any individual who employs and pays a lawyer to act for him in a law suit involving a racial question. It also covers the plaintiff corporations in their effort to raise the money which in the past has been used to assist the colored people in the prosecution of suits to secure their constitutional rights both before and after the decision in *Brown* v. *Board of Education*.[10]

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[10] The reported cases from both federal and state courts in this Circuit in which the Association or the Fund has taken an active part include: *Dawson* v. *Mayor and City Council of Baltimore City* and *Lonesome* v. *Maxwell*, 220 F. 2d 386, aff'd mem. 350 U. S. 877, and *Department of Conservation and Development* v. *Tate*, 231 F. 2d 615, cert. denied 352 U. S. 838, dealing with segregation at Maryland public beaches and Virginia public parks; *Morgan* v. *Commonwealth*, 184 Va. 24, rev'd 328 U. S. 373, and *Flemming* v. *South Carolina Elec. & Gas Co.*, 224 F. 2d 752 and 239 F. 2d 277, concerning segregation in bus transportation; *Alston* v. *School Board of City of Norfolk*, 112 F. 2d 992, cert. denied 311 U. S. 693, dealing with discriminatory fixing of school teachers' salaries; *University of Maryland* v. *Murray*, 169 Md. 478 and *Kerr* v. *Enoch Pratt Free Library of Baltimore City*, 149 F. 2d 212, cert. denied 326 U. S. 721, concerning racial discrimination in professional school admissions; *Briggs* v. *Elliott*, 103 F. Supp. 920, rev'd 347 U. S. 483, remanded 349 U. S. 294, decree entered 132 F. Supp. 776; *Davis* v. *County School Board of Prince Edward County*, 103 F. Supp. 337, rev'd 347 U. S. 483, remanded 349 U. S. 294, decree entered *sub nom*; *Allen* v. *County School Board of Prince Edward County*, 149 F. Supp. 431, rev'd — F. 2d —; *Hood* v. *Board of Trustees of Sumter County*, 232 F. 2d 626; *School Board of the City of Charlottesville, Va.* v. *Allen* and *County School Board of Arlington County, Va.* v. *Thompson*, 240 F. 2d 59; *School Board of the City of Newport News, Va.* v. *Atkins* and *School Board of the City of Norfolk, Va.* v. *Beckett*, 246 F. 2d 325, cert. den. 355 U. S. —, and *Slade* v. *Board of Education of Harford County, Md.*, 152 F. Supp. 114, relating to segregation in the public schools.

The right of access to the courts is one of the great safeguards of the liberties of the people and its denial or undue restriction is a violation of the due process clauses of the Fifth and Fourteenth Amendments. That the restriction is onerous in this insistance cannot be denied, for it is not confined to identification of the collectors of the funds but requires the disclosure of every contributor and of every member of the Association whose annual dues may have been used in part to pay the expenses of litigation.

Undoubtedly a state may protect its citizens from fraudulent solicitation of funds by requiring a collector to establish his identity and his authority to act; and the state may also regulate the time and manner of the solicitation in the interest of public safety and convenience. *Cantwell* v. *Connecticut*, 310 U. S. 296, 306; *Thomas* v. *Collins*, 323 U. S. 516, 540. Corrupt Practices Acts which seek to preserve the purity of elections by requiring the disclosure of the identity of those who strive to influence the choice of public officials are also a proper subject of legislative regulation. *Burroughs* v. *United States*, 290 U. S. 534. The statute before us, however, presents a very different case. It requires not merely the identity of the collector of the funds but the disclosure of the name of every contributor. In effect, as applied to this case, it requires every person who desires to become a member of the Association and to exercise with it the rights of free speech and free assembly to be registered, and the size of his contribution to be shown. This seems to us far more onerous than the requirement of a license to speak, which was struck down as unconstitutional in *Thomas* v. *Collins, supra*, especially as in this instance the disclosure is prescribed as part of a deliberate plan to impede the contributors in the assertion of their constitutional rights. In our opinion all four clauses of § 2 as applied to the plaintiffs in this case are unconstitutional.

In reaching this conclusion we may fairly consider not

only the rights of the plaintiff corporations but also the rights of the individuals for whom they speak, particularly the rights of the members of the Association and generally the members of the colored race in whose interests the plaintiffs carry on their work. The rights that the plaintiffs assert take their color and substance from the rights of their constituents; and it is now held that where there is need to protect fundamental constitutional rights the rule of practice is relaxed, which confines a party to the assertion of his own rights as distinguished from the rights of others. See *Barrows* v. *Jackson*, 346 U. S. 249, 257. This rule was applied in *Brewer* v. *Hoxie School District*, 8 Cir., 238 F. 2d 91, 104, where the school board in an Arkansas county brought suit to restrain certain organizations from obstructing the board in its efforts to secure the equal protection of the laws to all persons in the operation of the public schools in the district. The court said:

> "The school board having the duty to afford the children the equal protection of the law has the correlative right, as has been pointed out, to protection in performance of its function. Its right is thus intimately identified with the right of the children themselves. The right does not arise solely from the interest of the parties concerned, but from the necessity of the government itself. * * * Though, generally speaking, the right to equal protection is a personal right of individuals, this is 'only a rule of practice', * * * which will not be followed where the identity of interest between the party asserting the right and the party in whose favor the right directly exists is sufficiently close."

For like reasons Chapter 31, which covers much the same ground as clause (4) of § 2 of Chapter 32, must also be held invalid. The introductory paragraph of § 2 is as follows:

> "No person shall engage in the solicitation of funds from the public or any segment thereof when

such funds will be used in whole or in part to commence or to prosecute further any original proceedings, unless such person is a party or unless he has a pecuniary right or liability therein, nor shall any person expend funds from whatever source received to commence or to prosecute further any original proceedings, unless such person is a party or has a pecuniary right or liability therein until any person shall first:"—and then follows

Section 2(1) which requires the corporation to file annually a copy of its charter, a certified list of its officers and directors and members, a statement showing the source of each contribution or other item of revenue received during the preceding year and, if required by the State Corporation Commission, the name and address of each contributor; also a statement showing in detail the expenditures during the preceding year and any other information required by the State Corporation Commission.

Section 3 makes a violation of the Act a misdemeanor punishable by fine of not more than $10,000 and the denial of admission to do business in the state. Violations of the Act may be enjoined in any court of record having civil jurisdiction. Every director and officer of the corporation and every person responsible for the management of its affairs is personally liable for the payment of the fine.

Further consideration of the restrictions imposed upon litigation on behalf of the colored race by the Virginia plan will be found in the following discussion in respect to Chapters 33, 35 and 36 also passed at the Extra Session of 1956.

CHAPTER 35

Chapters 33, 35 and 36 all relate to the improper practice of law. They are of prime importance since they furnish the basis for the contention of the prosecuting officers of the state that the plaintiff corporations are un-

lawfully engaged in the practice of law in Virginia and hence are not entitled to maintain these suits. Chapters 35 and 36, and the amendment of the sections of the Virginia Code relating to the illegal practice of law contained in Chapter 33, are new in the statute law of the state and are essential parts of the plan which deprives the colored people of the state of the assistance of the Association and the Fund in the assertion of their constitutional rights. To this end each of the statutes contains provisions which would bar the Association and the Fund from continuing to give the kind of assistance to colored plaintiffs in racial litigation which they have rendered for many years in the past.

We consider first Chapter 35 since it contains a carefully phrased definition of the crime of barratry and is free from ambiguity. Barratry is defined in § 1 as stirring up litigation; a barrator is one who stirs up litigation; and stirring up litigation means instigating a person to institute a suit at law or equity. The terms "instigating," "justified" and "direct interest" are defined in § 1(d), (e) and (f) as follows:

> "(d) 'Instigating' means bringing it about that all or part of the expenses of the litigation are paid by the barrator or by a person or persons (other than the plaintiffs) acting in concert with the barrator, unless the instigation is justified.
>
> "(e) 'Justified' means that the instigator is related by blood or marriage to the plaintiff whom he instigates, or that the instigator is entitled by law to share with the plaintiff in money or property that is the subject of the litigation or that the instigator has a direct interest in the subject matter of the litigation or occupies a position of trust in relation to the plaintiff; or that the instigator is acting on behalf of a duly constituted legal aid society approved by the Virginia State Bar which offers advice or assistance in all kinds of legal matters to all members of the public who come to

it for advice or assistance and are unable because of poverty to pay legal fees.

"(f) 'Direct interest' means a personal right or a pecuniary right or liability."

The Legislature was careful to make exception of certain special situations and class suits in the following language:

> "This act shall not be applicable to attorneys who are parties to contingent fee contracts with their clients where the attorney does not protect the client from payment of the cost and expense of litigation, nor shall this act apply to any matter involving annexation, zoning bond issues, or the holding or results of any election or referendum, nor shall this act apply to suits pertaining to or affecting possession of or title to real or personal property, regardless of ownership, nor shall this act apply to suits involving the legality of assessment of collection of taxes or the rates thereof, nor shall this act apply to suits involving rates or charges or services by common carriers or public utilites, nor shall this act apply to criminal prosecutions, nor to the payment of attorneys by legal aid societies approved by the Virginia State Bar, nor to proceedings to abate nuisances. Nothing herein shall be construed to be in derogation of the constitutional rights of real parties in interest to employ counsel or to prosecute any available legal remedy under the laws of this State."

The reference to the Virginia State Bar in §§ 1(e) and (f) is explained by the terms of Chapter 47, also passed at the Extra Session, which authorized the State Bar through its governing body to promulgate rules and regulations governing the function and operation of legal aid societies, and empowered the Attorney General to enforce such rules and regulations if authorized to do so by the State Bar. The record in this case does not show whether the State Bar has taken action under the statute, but for

present purposes this is not important since 1(e) of Chapter 35 limits the regulatory power of the State Bar to legal aid societies which offer advice or assistance in all kinds of legal matters to all members of the public who come to it advice and assistance and are unable because of poverty to pay legal fees. Organizations such as the Association and the Fund, which offer advice and assistance to a limited class of persons only, could not claim that they were "justified", even if they should have been approved by the State Bar.

Sections 2 and 3 make it a misdemeanor to engage in barratry punishable, if the barrator is a foreign corporation, by a fine of not more than $10,000 and the revocation of its certificate of authority to do business in the state; and § 6 declares that an attorney at law who violates the Act is guilty of unprofessional conduct and that his license to practice law shall be revoked after hearing (under § 54-74 of the Code) for such period as the court may determine.

Obviously the plaintiff corporations will be amenable to these penalties if they continue to pay any part of the expenses of racial litigation in Virginia since they would not be "justified" within the terms of 1(e) of the Act; and attorneys at law connected with the plaintiff corporations who prosecute suits for colored persons, when authorized by them to do so, would also be liable to punishment if they assist, as they have done in the past, in bringing it about that any part of the expenses of litigation are paid by the Association or by the Fund.

The broad question is therefore raised as to whether it is within the power of the state to make it a crime for any corporation other than a general legal aid society to pay in whole or in part the expenses of litigation if it has only a general philanthropic or charitable interest in the litigation and does not have the kind of special interest described in the statute. Specifically, as applied to the facts of this case, the question is whether Virginia may make

it a crime for organizations interested in the preservation of civil rights to contribute money for the prosecution of lawsuits instituted to promote this cause.

The right of the state to require high standards of qualification for those who desire to practice law within its borders and to revoke or suspend the license to practice law of attorneys who have been guilty of unethical conduct is unquestioned. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232; *Richmond Assn. of Credit Men* v. *Bar Association*, 167 Va. 327; *Campbell* v. *Third Dist. Committee*, 179 Va. 244. Solicitation of business by an attorney is regarded as unethical conduct and a proper subject of disciplinary action; and it has been held that the state may prohibit a layman engaged in the business of collecting accounts from soliciting employment for this purpose, since a regulation which aims to bring the conduct of the business in harmony with the ethical practices of the legal profession is reasonable. *McCloskey* v. *Tobin*, 252 U. S. 107. Independent of statute, it is contrary to public policy for a corporation to practice law, directly or indirectly, since the relationship of attorney and client is one involving the highest trust and confidence and cannot exist between an attorney employed by the corporation and a client of the corporation; and so in *Richmond Assn. of Credit Men* v. *Bar Association*, *supra*, it was held that a credit association was engaged in the unlawful practice of law when, acting with the authority of creditors, it selected and paid the lawyers who were employed to make the collection by suit or otherwise.

The standards of the legal profession in these respects are carefully set forth in Canon 28 of the Canons of Professional Ethics of the American Bar Association, which condemns the stirring up of strife and litigation and declares it unprofessional for a lawyer to volunteer advice to bring a law suit except in cases where ties of blood, relationship or trust make it his duty to do so. It is de-

clared to be disreputable to engage in such acts as hunting up defects in titles or seeking claims for personal injuries, or employing agents or runners for like purposes.

It is manifest, however, that the activities of the plaintiff corporations are not undertaken for profit or for the promotion of ordinary business purposes but, rather, for the securing of the rights of citizens without any possibility of financial gain. Its activites are not covered by Canon 28 but rather by Canon 35 entitled *Intermediaries*, which relates *inter alia* to the aid rendered to indigent litigants by charitable societies and provides in part as follows:

> "The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigents are not deemed such intermediaries."

Canon 35 was cited with approval in *Richmond Assn. of Credit Men* v. *Bar Association*, 167 Va. at 334. Indeed the exclusion of lawyers when acting for benevolent purposes and charitable societies, as distinguished from business corporations, from the restrictions imposed by the canons of Professional Ethics has long been recognized in the approval given by the courts to services voluntarily offered by members of the bar to persons in need, even when the attorneys have been selected by corporations organized to serve a cause in a controversial field. See the historic incidents listed in the opinion *In re Ades*, D. C.-Md. 6 F. Supp. 467, 475; and see also *Gunnells* v. *Atlanta Bar Assn.*, 191 Ga. 366, 12 S. E. 2d 602, where the Supreme Court of Georgia refused an injunction to restrain the bar associa-

tion and its members from offering their services to borrowers of money at usurious rates in defense of suits that might be brought against them. The Court said at page 382:

> "It is not wrongful to induce a repudiation of an illegal contract. * * * Nor was the defendant's offer to represent free of charge persons caught in the toils of the usurious money-lender in defending against such illegal exactions, and to represent them in bringing actions to recover amounts illegally paid under loan contract, a violation of the Code, * * * in reference to the solicitation of legal employment and the offense of barratry. We do not believe that it is true, as contended by counsel for the plaintiff, that the enforcement of the usury laws of this State is a matter solely for the law-enforcement officers and of those from whom usury is being exacted, and that it is illegal and unethical for lawyers to publicly criticize an alleged widespread violation of such laws and to seek to eradicate the evil by the means here shown. Much could be said as to why their position in the community makes it entirely appropriate that they undertake such a movement and assume such responsibilities in reference to the general welfare of the public. We see no reason why the judgment of the learned judge should be disturbed."

Chapter 35, in failing to recognize this settled rule, violates well-established constitutional principles in its bearing upon the plaintiff corporations. "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment", *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238. In the first place, the statute obviously violates the equal protection clause, for it forbids the plaintiffs to defray the expenses of racial litigation, while at the same time it legalizes the activities of legal aid societies that serve all needy persons in all sorts of litigation. No

argument has been offered to the court to sustain this discrimination. Moreover, Chapter 35 violates the due process clause, for it is designed to put the plaintiff corporations out of business by forbidding them to encourage and assist colored persons to assert rights established by the decisions of the Supreme Court of the United States. The activities of the plaintiffs as they appear in these cases do not amount to a solicitation of business or a stirring up of litigation of the sort condemned by the ethical standards of the legal profession. They comprise in substance public instruction of the colored people as to the extent of their rights, recommendation that appeals be made to the courts for relief, offer of assistance in prosecuting the cases when assistance is asked, and the payment of legal expenses for people unable to defend themselves; and the attorneys who have done the work have done so only when authorized by the plaintiffs. The evidence is uncontradicted that the initial steps which have led to the institution and prosecution of racial suits in Virginia with the assistance of the Association and the Fund have not been taken until the prospective plaintiffs made application to one or the other of the corporations for help. In our opinion the right of the plaintiff corporations to render this assistance cannot be denied.

No doubt, the State of Virginia has the right reasonably to regulate the practice of law, but, where that regulation prohibits otherwise lawful activities without showing any rational connection between the prohibition and some permissible end of legislative accomplishment, the regulation fails to satisfy the requirements of due process of law. Here, under the guise of regulating unauthorized law practice, the General Assembly has forbidden plaintiffs to continue their legal operations.

Chapters 33 and 36 are also phrased so as to interfere with the activities of the plaintiffs. This is done in Chap-

ter 33 by amending §§ 54-74, 54-78 and 54-79 of Article 7 of the Code relating to malpractice and to the improper solicitation of legal business for an attorney by a "runner" or "capper", so as to include within the definition of these terms a person who employs an attorney in connection with any judicial proceeding in which the person has no pecuniary right or liability. The language of the statute, especially portions of § 54-74(6) and § 54-78(1),[11] is obscure

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[11] "§ 54-74.

(6) 'Any malpractice, or any unlawful or dishonest or unworthy or corrupt or unprofessional conduct', as used in this section, shall be construed to include the improper solicitation of any legal or professional business or employment, either directly or indirectly, *or the acceptance of employment, retainer, compensation, or costs from any person, partnership, corporation, organization or association with knowledge that such person, partnership, corporation, organization or association has violated any provision of Article 7 of this chapter.* . . ."

"§ 54-78. As used in this article:

(1) A 'runner' or 'capper' is any person, corporation, partnership or association acting in any manner or in any capacity as an agent for an attorney at law within this State *or for any person, partnership, corporation, organization or association which employs, retains or compensates any attorney at law in connection with any judicial proceeding in which such person, partnership, corporation, organization or association is not a party and in which it has no pecuniary right or liability*, in the solicitation or procurement of business for such attorney at law * *or for such person, partnership, corporation, organization or association in connection with any judicial proceedings for which such attorney or such person, partnership, corporation, organization or association is employed, retained or compensated.*

*"The fact that any person, partnership, corporation, organization or association is a party to any judicial proceeding shall not authorize any runner or capper to solicit or procure business for such person, partnership, corporation, organization or association or any attorney at law employed, retained or compensated by such person, partnership, corporation, organization or association.*

"(2) An 'agent' is one who represents another in dealing with a third person or persons."

and difficult to understand, but the general purpose seems to be to hit any organization which participates in a law suit in which it has no financial interest and also to fasten the charge of mal-practice upon any lawyer who accepts employment from such an organization. If the statute should be so interpreted as to forbid a continuance of the activities of the plaintiff corporations in respect to litigation as described in this opinion, it would in large measure destroy their effectiveness.

Chapter 36, § 1(a), is aimed at anyone not having a direct interest in the proceeding, who gives, receives or solicits anything of value as an inducement to any person to commence a proceeding in any court or before any administrative agency of the state or in any United States court in Virginia against the Commonwealth of Virginia, or any department or subdivision thereof, or any person acting as an officer or employee of any of the foregoing. Section 1(b) makes it unlawful for anyone who has no direct interest in the subject matter of the proceeding to advise or otherwise instigate the bringing of a suit or action against any of the defendants above described. Here again the language is ambiguous, and doubts have arisen as to whether the giving of advice to persons as to their constitutional rights amounts to the "instigation" [12] of a suit or whether the giving of money to needy litigants amounts to an "inducement" to bring a suit. If so construed as to restrict the activities of the plaintiff corporations disclosed by the evidence in these cases, their effectiveness would be in large measure destroyed. Since Chapters 33 and 36 are vague and ambiguous we do not pass upon their constitutionality.

We have come perforce to these final conclusions since the contrary position cannot be justly entertained. If the

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[12] In Chapter 35 the verb "to instigate" is given a very precise definition, but in Chapter 36 it is given no definition at all.

Acts of the General Assembly of Virginia should be held to outlaw the activities of the plaintiff corporations, the Commonwealth would be free to use all of its resources in its search for lawful methods to postpone and, if possible, defeat the established constitutional rights of a body of its citizens, while the colored people of the state would be deprived of the resources needed to resist the attack in the state and federal courts. The duty of this court to avoid such a situation, if possible, is manifest.

Accordingly, an injunction will be granted restraining the defendants from proceeding against the plaintiffs under Chapters 31, 32 and 35 because of the activities of the plaintiffs in the past on behalf of the colored people in Virginia as disclosed in the evidence in these cases or because of the continuance of like activities in the future.

As to Chapters 33 and 36, the complaints will be retained for a reasonable time pending the determination of such proceedings in the state courts as the plaintiffs may see fit to bring to secure an interpretation of these statutes; and in the meantime, the court will assume that the defendants will continue to co-operate, as they have in the past, in withholding action under the authority of the statutes until a final decision is reached; and the plaintiffs may petition the court for further action if at any time they deem it their interest to do so.

HOFFMAN, *District Judge*, concurs.

HUTCHESON, District Judge, concurring in part and dissenting:

This Court has before it for determination certain questions which may be resolved into one, simply stated; that is, whether this Court is to be bound by well-known principles of judicial construction, firmly embedded in the fabric of the law and announced time after time by the Supreme Court of the United States, or is this Court to disregard these principles and follow a new course based upon inferences tortuously drawn from expressions which may be found in some of the opinions? A mere statement of the question demonstrates its importance. That importance is accentuated by the fact that the case involves the traditionally delicate balance between the courts of the state and the Federal Courts. The importance of the principle can hardly be over emphasized.

Repeatedly the Courts have discussed at length the "deeply rooted" doctrine which has become a "time-honored canon of constitutional adjudication" that Federal Courts do not interfere with state legislation when the asserted federal right may be preserved without such interference. We have been told by the Supreme Court in clear language that where it is necessary to construe a state statute in order to determine whether a federal right is involved the construction must be that of the court of the state by which the statute is to be enforced. The rule and the reason for the rule have been made plain by the same authority.

Before discussing the areas in which I find myself in disagreement with my learned associates, I am glad to concur in their decision that the exercise of jurisdiction be withheld as to *Chapters 33 and 36* of the *Acts of the General Assembly* until those statutes have been construed by the courts of the state, although I do not agree with the reasoning upon which that decision is based.

At this point my concurrence ends. Since my views concerning the issues are so much at variance with those expressed in the majority opinion I am constrained to file this separate opinion. In addition to disagreement with the legal conclusions of the majority of the Court, I find myself in disagreement with their statement of the facts. In my opinion the evidence does not support many factual conclusions recited in the elaborate statement found in the opinion. Since the facts are of minor importance at this point, I shall not undertake to set out the numerous errors and omissions which appear. It would serve no useful purpose and would unduly prolong this opinion. However, for the record I register my disagreement.

In passing, attention is called to what I regard as an immaterial and unnecessary discussion of extraneous matter relating to the action of the Supreme Court in the School Segregation Cases, speeches of the Governor of Virginia, expressions contained in a report of a Legislative Commission appointed by the Governor, resolutions of the General Assembly, the Constitutional Referendum, and the decisions involving what is known as the Pupil Placement Act. The lengthy recital pertaining to the legislative history can have only one effect, which is to becloud the issue before the Court and to surround the case with an atmosphere foreign to the judicial calm which should prevail when a legal principle is dealt with. I question the relevancy of much of this material at any time, but certainly it can have no proper place here where we are concerned with orderly procedure in a court of law and with a principle of first importance. The issue should not be obscured by an emotional approach.

Such facts as need be stated here are simple and may be briefly recited. Plaintiffs are corporations chartered under the laws of the State of New York and licensed to do business in Virginia. The defendants are the Attorney General of Virginia and certain other officials, charged with

enforcing the laws of the Commonwealth. The principal objectives of the plaintiffs, sofar as here pertinent, are the dissemination of information concerning the legal rights of members of the colored race, the organization of groups to seek the enforcement of such rights, the solicitation of funds to be used, and the use of such funds, in promoting the objectives stated and in financing litigation involving cases in which it is alleged that members of that race are being discriminated against on account of racial origin.

In Extra Session in 1956 the General Assembly in Virginia passed certain statutes which are the subject matter of the present controversy. Those statutes fall into two categories.

The first, consisting of *Chapters 31 and 32*, are designed to regulate the conduct of persons or corporations who solicit funds to be used and to expend funds to finance or maintain litigation of others. Emphasis is placed upon activities pertaining to conflicting racial interests. The statutes would be applicable to activities such as those engaged in by the plaintiffs and those of other organizations similarly operating in Virginia.

The second set of statutes, being *Chapters 33, 35 and 36*, are designed to regulate the conduct of those licensed to or engaged in the practice of law in Virginia.

The plaintiffs contend that the statutes are unconstitutional in that if enforced they would be deprived of rights guaranteed under the Fourteenth Amendment to the Constitution of the United States. The relief sought is an injunction and a declaratory judgment. While there are actually two cases brought by separate plaintiffs the issues are such that they are being dealt with as one.

Motions to dismiss for lack of jurisdiction have been filed and there has been a full hearing of the case. The various questions presented have been argued, and may be concisely stated as dealing with the following:

1. Jurisdiction of the Court;

2. Motives of the General Assembly in enacting the statutes;

3. Whether in the exercise of its discretion the Court should accept jurisdiction if it exists;

4. The construction of the statutes.

JURISDICTION OF THE COURT

The jurisdiction of the Court is attacked upon two grounds. The first relates to the jurisdictional amount of $3,000.00 under the Diversity Statute, and the second relates to the civil rights of a corporation under the *Fourteenth Amendment*.

(a) While it may be debatable, it is my view that the jurisdictional amount has been shown by the evidence presented sufficiently to justify the Court in hearing the cases.

(b) The defendants rely upon *Hague* v. *C. I. O.*, 307 U. S. 496, in support of their contention that the corporations are not entitled to the privileges and immunities which the *Fourteenth Amendment* secured for citizens of the United States. For present purposes a recital of the facts of that case may be limited to the statement that the plaintiffs consisted of certain individuals and a corporation, all of whom contended that the enforcement of a city ordinance would deprive them of the right of free speech. The case is directly in point. There were a number of opinions filed. In the main syllabus the following language is used:

> "The ordinances and their enforcement violate the rights under the Constitution of the individual plaintiffs, citizens of the United States; but a complaining corporation can not claim such rights. P. 514."

In the syllabus covering the opinion of Mr. Justice Roberts substantially the same analysis is given. *Point 1.* See also *Section 1* in syllabus of the opinion of Mr. Justice Stone.

In the opinion of Mr. Justice Roberts, in which Mr. Justice Black concurred, the following appears on *page 514*:

> "Natural persons, and they alone, are entitled to the privileges and immunities which Section 1 of the Fourteenth Amendment secured for 'citizens of the United States'. (Citing cases.) Only the individual respondents may, therefore, maintain this suit."

In the opinion of Mr. Justice Stone, with Mr. Justice Reed concurring, on *page 527* the following language appears:

> "Since freedom of speech and freedom of assembly are rights secured to persons by the due process clause, all of the individual respondents are plainly authorized by Section 1 of the Civil Rights Act of 1871 to maintain the present suit in equity to restrain infringement of their rights. As to the American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons." (Citing cases.)

In the concurring opinion of Mr. Chief Justice Hughes on *page 532*, the following appears:

> "With respect to the point as to jurisdiction I agree with what is said in the opinion of Mr. Justice Roberts as to the right to discuss the National Labor Relations Act being a privilege of a citizen of the United States, but I am not satisfied that the record adequately supports the resting of jurisdiction upon that ground. As to that matter, I concur in the opinion of Mr. Justice Stone." See dissenting opinion of Mr. Justice Butler.

Mr. Justice McReynolds dissented, being of opinion the case should be remanded to the District Court with instructions to dismiss the bill, he having concluded that the District Court should have refused to interfere with the rights of the municipality to control its parks and streets. He used the following language:

> "Wise management of such intimate local affairs, generally at least, is beyond the competency of federal courts, and essays in that direction should be avoided.
>
> "There was ample opportunity for respondents to assert their claims through an orderly proceeding in courts of the state empowered authoritatively to interpret her laws with final review here in respect of federal questions."

See also interpretation of Mr. Justice Frankfurter in *Bridges* v. *State of California*, 314 U. S. 252, 280, where in a dissenting opinion he discusses the rights of the states in respect of their internal affairs. He cites *Hague* as drawing a distinction between the rights of natural and artificial persons.

The plaintiffs here, both being corporations, contend they are entitled to such protection and point to the earlier case of *Grosjean* v. *American Press Company*, 297 U. S. 233,[1] and other cases involving corporations engaged in the publication of newspapers, magazines, etc. A careful examination of Grosjean discloses that it does not support such contention. On *page 244* the Court, after observing that freedom of speech and of the press *are rights of the same fundamental character*, (the Court did not say the rights are the *same* as would appear to be the interpretation by the majority of this Court) safeguarded by the due process of law clause, used the following language:

> "Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only

[1] Cited in Hague v. C. I. O. at page 519.

partly true. A corporation, we have held, is not a 'citizen' within the meaning of the privileges and immunities clause. *Paul* v. *Virginia*, 8 Wall. 168. But a corporation is a 'person' within the meaning of the equal protection and due process of law clauses, which are the clauses involved here. *Covington & Lexington Turnpike Co.* v. *Sandford*, 164 U. S. 578, 592; *Smyth* v. *Ames*, 169 U. S. 466, 522."

The opinion concludes with the following language:

"Having reached the conclusion that the act imposing the tax in question is unconstitutional under the due process of law clause because it abridges the freedom of the press, we deem it unnecessary to consider the further ground assigned that it also constitutes a denial of the equal protection of the laws."

This language should set at rest the contention that that case is controlling as respects the position of the plaintiffs. It could not be clearer that it does not support that contention but it is consistent with *Hague*.

*Grosjean* and similar cases relate primarily to and are founded upon the right of freedom of the press. It follows that *Hague* is controlling and corporations are not entitled to the rights of a natural person. From the nature of the rights it is obvious that it was never intended that a corporation should enjoy such rights as a natural person. It is equally obvious that freedom of the press should not be limited to natural persons. This appears determinative of the rights of the plaintiffs. I realize that it is a question which properly may be determined by the state court and a determination by this Court at this time might be premature. My view is that it should finally dispose of the case.

## Motives of the General Assembly in Enacting the Statutes

The emphasis placed by the majority upon collateral occurrences would indicate reliance upon such occurrences in reaching the conclusions there stated as a justification for disregarding accepted rules of both procedure and construction. The majority has undertaken to assess the motives of the legislative body as a collective whole as distinguished from the familiar rule relating to legislative intention or purpose in construing statutes of uncertain meaning. They say, in effect, that by the enactment of certain other statutes relating to public schools coupled with the statutes now under attack, the Legislature has attempted to provide a legal means of avoiding compliance with the order of the Supreme Court of the United States in the School Segregation Cases. From this premise they infer that the statutes here involved are tainted with illegality by way of association—a somewhat novel concept which seems to have acquired some judicial recognition in recent times. They appear to proceed upon the theory that the Supreme Court has ordered the public schools mixed racially. As has been repeatedly pointed out, the Supreme Court did not make such an order. If lawful means to comply with the order issued and at the same time retain unmixed schools can be found, there is no unlawful thwarting of the Supreme Court mandate and consequently no invalidity shown. However, we are not now concerned with this question.

The issue here goes deeper. That issue is whether the Judicial branch of the Government can sit in judgment upon the collective personal motives or influences activating those charged with the responsibility of conducting the affairs of one of the other co-ordinate branches. If this can be done the result may be far-reaching indeed.

While it is proper for the Court in construing a statute to inquire into the intention or purpose of its enactment when its language is ambiguous or uncertain, inquiry into

the motives prompting the members of the legislative body in casting their votes respecting such enactment presents an entirely different situation. *Fletcher* v. *Peck*, 10 U. S. 87, decided in 1810, contains a discussion of the subject which is applicable today. In his opinion beginning on *page 128*, Chief Justice Marshall pointed to some of the perplexities which would be involved. Mr. Justice Johnson elaborated upon this in his opinion beginning on *page 143*. In that case actual fraud coupled with financial gain on the part of legislators was shown but the statutes were recognized as valid. It is inconceivable that the judicial branch of the Government should undertake to exercise the power to inquire into the motives of the legislative branch as a collective body. If the individual members are guilty of fraud or other unlawful conduct, they are subject to legal sanctions as individuals and they are answerable to their constituents at the polls.

Following the lengthy discussion of what is described as the "setting" in which the Acts were passed, the majority ignores *Fletcher* v. *Peck*, gives a nod of recognition to *Tenny* v. *Brandhove*, 341 U. S. 367, with an acknowledgment that a court may not inquire into the legislative motive and proceeds with an assertion that the legislative purpose may be the subject of inquiry, giving as authority *Baskin* v. *Brown*, 174 Fed. (2d) 391, 392, 393, and *Davis* v. *Schnell*, 81 Fed. Supp. 872, 878-880, affirmed by per curiam decision in *336 U. S. 933*, where it was noted that Mr. Justice Reed was of opinion that since a constitutional provision of a state was involved, probable jurisdiction should be noted and the case argued. From the language used by the majority, it would appear that purpose or intention have been confused with motive. The first case relied upon, *Davis* v. *Schnell*, was from a three-judge District Court in Alabama. It involved the right to vote. The Court recited in detail the legislative history of the act. In discussing its views in *Baskin* v. *Brown*, the Court cited *Davis* v. *Schnell* and quoted from that opinion concerning the intention and pur-

pose of the legislation. As I read both opinions, they use the term "purpose" as similar or synonymous with "intention". Neither discusses the motives influencing the Legislature and in neither is *Fletcher* v. *Peck* nor *Tenny* v. *Brandhove* mentioned. While they tend to give color to the suggestion that motive may be considered, I am unable to accept them as authority for such theory. And see *Lassiter* v. *Taylor*, 152 Fed. Supp. 295 (E. D. N. C.) (1957), from which may be inferred a position contrary to the *Harris* and *Baskin* cases. *Lane* v. *Wilson*, 307 U. S. 268, is the third case upon which the majority bases its conclusion upon this point. It must be borne in mind that *Lane* v. *Wilson* was an action for damages brought under a statute conferring original jurisdiction in such cases upon the Federal Court.

In none of these cases is the question so fully presented and discussed as in *Fletcher* and *Tenny*, in both of which the underlying principle is recognized.

If it be conceded that the Courts may inquire into the personal motives of legislators a maze of avenues of possible inquiry is seen. Must the motive be corrupt; what proof will show corruption—a state of mind or personal gain? Would undue influence vitiate the act? Must the improper motive exist on the part of a majority; if not on the part of a majority, on what number? If bad motive on the part of a majority of the legislature is required, is it necessary that it be a majority of the entire body or of only those who supported the legislation? What type of proof would be sufficient to show improper motive? Is the burden of proof similar to that required in ordinary cases involving fraud? Must actual fraud be proven or is constructive fraud sufficient? In recognition of the principle that the acts of a sovereign are pure, upon what historic concept can one of the three great branches of a republican form of government denounce as impure the act of a co-ordinate branch? If this can be done, will it be necessary that the third co-ordinate branch concur in the result? The questions posed show the absurdity of the contention urged

by the plaintiffs and apparently approved by the majority of this Court, that the motives of the legislature are a proper subject of inquiry.

Before leaving this subject, I call attention to what seems an inconsistency. Having assumed the power to interpret the statutes and basing that interpretation, at least in part, upon the motives of the Legislature, the majority denounces only some of the statutes and leaves the others for construction by the state Court. There naturally arises the question of why such motives should taint only a limited number of the statutes and not others constituting this alleged unlawful scheme.

WHETHER IN THE EXERCISE OF ITS DISCRETION THE COURT SHOULD ACCEPT JURISDICTION IF IT EXISTS

Time after time the Courts have given expression to the propriety of recognizing the delicate balance between the Courts of the states and the Federal Courts. This is as important now as it has been in the past.

This principle of judicial interpretation is based upon the fundamental concept of separate sovereigns embodied in the Constitution of the United States. The Courts have announced in clear and specific language the rule and the reasons for the rule.

Cases almost without number decided by the Supreme Court have recognized and upheld the doctrine now involved which may be illustrated by *Spector Motor Company* v. *McLaughlin*, 323 U. S. 101, decided in 1944. In that case suit was brought in a Federal District Court to enjoin the enforcement of a tax imposed by the State of Connecticut and a declaratory judgment. The Court proceeded to pass upon the constitutional questions presented. The statute had not been construed by the Connecticut Court. The following language was used by the Supreme Court:

> "It was conceded below that if the Connecticut tax was construed to cover petitioner it would run

afoul the Commerce Clause, were this Court to adhere to what Judge Learned Hand called 'an unbroken line of decisions'. On the basis of what it deemed foreshadowing 'trends', the majority ventured the prophecy that this Court would change its course, and accordingly sustain the tax. In view of the far-reaching import of such a disposition by the Circuit Court of Appeals we brought the case here."

After referring to questions touching the taxing powers of the states and their relation to the Commerce Clause, the Court said:

"We would not be called upon to decide any of these questions of constitutionality, with their varying degrees of difficulty, if, as the District Court held, the statute does not at all apply to one, like petitioner, not authorized to do intrastate business. Nor do they emerge until all other local Connecticut issues are decided against the petitioner. But even if the statute hits aspects of an exclusively interstate business, it is for Connecticut to decide from what aspect of interstate business she seeks an exaction. It is for her to say what is the subject matter which she has sought to tax and what is the calculus of the tax she seeks. Every one of these questions must be answered before we reach the constitutional issues which divided the court below.

"Answers to all these questions must precede consideration of the Commerce Clause. To none have we an authoritative answer. Nor can we give one. Only the Supreme Court of Errors of Connecticut can give such an answer. But this tax has not yet been considered or construed by the Connecticut courts. We have no authoritative pronouncements to guide us as to its nature and application. That the answers are not obvious is evidenced by the different conclusions as to the scope of the statute reached by the two lower courts. The Connecticut Supreme Court may disagree with the District Court and agree with the Circuit Court of Appeals as to the applicability of the statute. But this is an assumption and at best 'a forecast rather than a determination.' Railroad Commission v. Pullman Co.,

312 U. S. 496, 499. Equally are we without power to pass definitively on the other claims urged under Articles I and II of the Connecticut Constitution. If any should prevail, our constitutional issues would either fall or, in any event, may be formulated in an authoritative way very different from any speculative construction of how the Connecticut courts would review this law and its application. Watson v. Buck, 313 U. S. 387, 401-402.

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality—here the distribution of the taxing power as between the State and the Nation—unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law. Railroad Commission v. Pullman Co., supra; Chicago v. Fieldcrest Dairies, 316 U. S. 168; In re Central R. Co. of New Jersey, 136 F. 2d 633. See also Burford v. Sun Oil Co., 319 U. S. 315; Meredith v. Winter Haven, 320 U. S. 228, 235; Green v. Phillips Petroleum Co., 149 F. 2d 466; Findley v. Odland, 127 F. 2d 948; United States v. 150.29 Acres of Land, 135 F. 2d 878. Avoidance of such guesswork, by holding the litigation in the federal courts until definite determinations on local law are made by the state courts, merely heeds this time-honored canon of constitutional adjudication.

"We think this procedure should be followed in this case."

As will be later shown, the foregoing rule has been consistently applied with a negligible number of exceptions.

On this issue of vital importance the majority opinion seems based upon a quotation found in a dissenting opinion in *Bryan* v. *Austin* (E. D. S. C.), 148 Fed. Supp. 563, 567, 568. The entire text of that portion of the dissenting opin-

ion so relied upon may be found in the footnote 2. The underscored portion is that part omitted from the quotation incorporated into the majority opinion.[2]

With due deference to the learned author of that opinion, my examination of the cases cited does not lead me to the same conclusion as that stated, nor have I found any other pronouncements of the Supreme Court which lead me to that conclusion. After an earlier reference to the celebrated declaration of Chief Justice Marshall in *Cohens*

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[2] "I recognize, of course, that, in the application of the rule of comity, a federal court should stay action pending action by the courts of a state, where it is called upon to enjoin the enforcement of a state statute which has not been interpreted by the state courts, and where the statute is susceptible of an interpretation which would avoid constitutional invalidity. As the federal courts are bound by the interpretation placed by the highest court of a state upon a statute of that state, they should not enjoin the enforcement of a statute as violative of the Constitution in advance of such an interpretation, if it is reasonably possible for the statute to be given an interpretation which will render it constitutional. *This is all that is held by the Supreme Court in such cases as Shipman* v. *Dupre*, 339 U. S. 321, 70 S. Ct. 640, 94 L. Ed., 877, and *A. F. of L.* v. *Watson*, 327 U. S. 582, 596, 598, 66 S. Ct. 761, 90 L. Ed. 873. *The Supreme Court in Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U. S. 341, 344, 71 S. Ct. 762, 95 L. Ed. 1002, *recognizes that proceedings should be stayed only where there is involved 'construction of a state statute so ill-defined that a federal court should hold the case pending a definitive construction of that statute in the state Courts'. In the case of Toomer* v. *Witsell*, 334 U. S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460, *in which the District Court had upheld the constitutionality of a state statute, the Supreme Court reversed the decision without staying proceedings for action by the state courts. And in Doud* v. *Hodge*, 350 U. S. 485, 76 S. Ct. 491, 100 L. Ed. 577, *the Supreme Court reversed the dismissal of a case by a District Court*, 127 F. Supp. 853, *where the dismissal was granted on the ground that a statute alleged to be unconstitutional had not been passed upon by the courts of the state.* The rule as to stay of proceedings pending interpretation of a state statute by the courts of the state can have no application to a case, such as we have here, where the meaning of the statute is perfectly clear and where no interpretation which could possibly be placed upon it by the Supreme Court of the state could render it constitutional."

v. *Virginia*, 6 Wheat. 264, concerning the usurpation of jurisdiction, he concedes that in *Shipman* v. *DuPre*, 339 U. S. 321 and *A. F. of L.* v. *Watson*, 327 U. S. 582, 600, the Supreme Court held that the Federal Courts are bound by interpretation of the statute by the highest court of the state and should not enjoin the enforcement of such statute as violative of the Constitution in advance of such interpretation. The following language is then used:

> "* * * if it is reasonably possible for the statute to be given an interpretation which will render it constitutional. This is all that is held by the Supreme Court in such cases as * * *." Shipman and A. F. of L.

The learned author then asserts that "the Supreme Court in *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U. S. 344, * * * recognizes that proceedings should be stayed *only* where there is involved 'construction of a state statute so ill-defined that a federal court should hold the case pending a definite construction of that statute in the state cours.'" (Emphasis supplied.)

I find nothing in *Shipman* referring to the susceptibility of the statute to different interpretations.

*A. F. of L.* v. *Watson*, contains the following language on *page 599*:

> "The doubts concerning the meaning of the Florida law indicate that such a procedure is peculiarly appropriate here."

The procedure referred to was an interpretation of the Florida constitutional amendment by the state court before the Federal Court exercised jurisdiction. The case was reversed and remanded, with directions that the bill be retained pending determination of the state court proceedings.

I do not read *Alabama* as supporting the assertion that proceedings should be stayed *only* where an ill-defined statute is involved. The only language I find bearing re-

semblance to such a doctrine appears on *page 344*, as follows:

> "Federal jurisdiction in this case is grounded upon diversity of citizenship as well as the allegation of a federal question. Exercise of that jurisdiction does not involve construction of a state statute so ill-defined that a federal court should hold the case pending a definitive construction of that statute in the state courts, e.g., Railroad Commission of Texas v. Pullman Co., 312 U. S., 496 (1941): Shipman v. DuPre, 339 U. S., 321 (1950). We also put to one side those cases in which the constitutionality of a state statute itself is drawn into question, e.g., Toomer v. Witsell, 334 U. S., 385 (1948)."

In that case suit was brought in a Federal Court to enjoin an order of the Alabama Public Service Commission. Without prior action by the state court, the Federal Court heard the case and rendered judgment. After pointing out that state court review was available to the plaintiff, the Supreme Court referring to the "scrupulous regard for the rightful independence of state governments which should at all times actuate the Federal Courts", said:

> "Considering that 'few public interests have a higher claim upon the discretion of a chancellor than the avoidance of needless friction with state policies', the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts."

In reversing the lower Court, the Supreme Court cited with approval *Great Lakes Dredge and Dock Co.* v. *Huffman*, 319 U. S., 293, 297-298 (1943).

The other cases referred to in the dissenting opinion are *Toomer* v. *Witsell*, supra, and *Doud* v. *Hodge*, 350 U. S., 485. *Toomer*, at best, is also negative authority. In that case jurisdiction was exercised with no discussion of the principle here involved. *Doud* merely said that the Supreme Court has never held that a District Court is without jurisdiction in such cases, although in reversing the District

Court for dismissing for lack of jurisdiction the Supreme Court expressly declined to prescribe further procedure on remand. It is obvious that the Supreme Court intended that the approved procedure of obtaining construction by the state court was to be followed:

From what has been said all that I can read into the cases cited as authority for the affirmative assertion that proceedings should be stayed until state court action *only* where an ill-defined statute is involved, is at the most of a negative character and limited to an insignificant number of cases.

The majority adopts that portion of the dissenting opinion in *Bryan* v. *Austin*, and proclaims as a policy of judicial interpretation that a stay of proceedings in the Federal Courts is not required in cases in which the state statutes at issue are free of doubt or ambiguity. It is respectfully submitted that the pronouncement of such a doctrine is not warranted by the authorities cited. It is true that in some few cases the Supreme Court has not required such prior interpretation but this fact falls far short of establishing a rule of procedure under which proceedings in a Federal Court in a case such as this should be stayed *only* where the statute involved is so ill-defined that its constitutionality is doubtful until it is construed judicially.

Even should the rule so announced be the correct one, it would have no application in this case, as a reasonably careful examination of the statutes will disclose the necessity for interpretation, as later pointed out.

The rule laid down by the Supreme Court and consistently followed is that cited in *Spector* v. *McLaughlin*, supra. The majority opinion has cited *Spector Motor Company* and *Government Employees* v. *Windsor*, 347 U. S., 901 and 353 U. S., 364; *Shipman* v. *DuPre*, supra; *A. F. of L.* v. *Watson*, supra. This Court is bound to follow, distinguish or disregard those cases and others to be cited. It has no power to reverse.

The language of the majority discloses that my learned associates have followed the example of the majority of the

Court of the Second Circuit in *Spector*. To again quote the Supreme Court in that case on *page 103*:

> "On the basis of what it deemed foreshadowing 'trends', the majority ventured the prophecy that this Court would change its course, and accordingly sustained the tax. In view of the far-reaching import of such a disposition by the Circuit Court of Appeals we brought the case here."

As has been seen, after emphasizing the "deeply rooted" doctrine which it termed "this time-honored canon of constitutional adjudication", the Supreme Court reversed the Circuit Court and remanded the case to await interpretation by the state court.

The decisions of the Supreme Court proclaiming and repeating this principle called the "doctrine of abstention" in *Railroad Commission* v. *Pullman Company*, 312 U. S., 496, at 501, are so numerous and contain such apt expressions that determining which should be cited and discussed presents a problem. An exhaustive analysis of all would result in a repetitious and unduly long discussion.

*Railroad* v. *Pullman*, supra, appears a good starting point. In that case a three-judge District Court enjoined an order of the Texas Railroad Commission. On appeal the Court referred to the fact that the Court consisted of an able and experienced judge of the circuit which includes Texas and of two capable district judges trained in Texas law. Then the Court said:

> "Had we or they no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law. But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case belongs neither to us nor to the district court but to the Supreme Court of Texas. In this situation a

federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication."

Could the Court have expressed itself in clearer terms? Referring to earlier cases the Court continued:

> "These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts 'exercising a wise discretion', restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary (citing cases). This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers."

The District Court was reversed and the case remanded with directions to retain the bill pending a determination of proceedings in the state court.

What change has come about since 1941 to justify a court in disregarding this clearly stated doctrine?

I find no expression from the Supreme Court changing this rule during the intervening years. On the contrary, as late as May 1947 the Court delivered its opinion in *Government Employees* v. *Windsor*, 353 U. S. 364. The procedural facts of that case are illuminating and significant. A labor organization and one of its members filed suit against officials of Alabama Alcoholic Beverage Control Board, of which the individual member was an employee. Plaintiffs sought an injunction and declaratory judgment to restrain the enforcement of a statute of Alabama. A three-judge court was convened. Plaintiffs contended that the statute was susceptible to no possible construction other than that of unconstitutionality and that the Federal Court should decline to stay proceedings pending action in the state court. Loss of members by the union and loss of employment benefits by the members were alleged. As here, no state action was pending. *Toomer* v. *Witsell*, supra.

appears to have been the authority relied upon by plaintiffs. The Court, after citing and discussing cases referred to by me, declined to exercise jurisdiction pending an exhaustion of state administrative and judicial remedies. 116 Fed. Supp. 354. The Supreme Court affirmed, 347 U. S. 901. Thereafter suit was filed in an Alabama Court, which declared the statute applicable to the complainant, its activities and its members and the injunction was denied. On appeal the final decree of that Court was affirmed by the Supreme Court of Alabama. 262 Alabama 785, 78 Sou. (2d) 646. The case was again submitted to the District Court. 146 Fed. Supp. 214. That Court said on *page 216*:

> "After a thorough reading and consideration of the final decree of the Circuit Court of Montgomery County in Equity and of the opinion of the Supreme Court of Alabama heretofore mentioned, it is clear to us that the Alabama courts have not construed the Solomon Bill in such a manner as to render it unconstitutional, and, of course, we can not assume that the state court will ever so construe said statute."

Judgment was entered accordingly.

Upon appeal the Supreme Court in a per curiam opinion (353 U. S. 364), after observing that "none of the constitutional contentions presented in the action pending in the United States District Court were advanced in the state court action," said:

> "We do not reach the constitutional issues. In an action brought to restrain the enforcement of a state statute on constitutional grounds, the federal court should retain jurisdiction until a definitive determination of local law questions is obtained from the local courts. One policy served by that practice is that of not passing on constitutional questions in situations were an authoritative interpretation of state law may avoid the constitutional issues. Spector Motor Co. v. McLaughlin, 323 U. S. 101, 105. Another policy served by that practice is the avoidance of the adjudication of abstract, hypothetical issues. Federal courts will not pass upon constitutional contentions presented in an abstract rather than in a concrete

form. Rescue Army v. Municipal Court, 331 U. S. 549, 575, 584. The bare adjudication by the Alabama Supreme Court that the union is subject to this Act does not suffice, since that court was not asked to interpret the statute in light of the constitutional objections presented to the District Court. If appellants' freedom-of-expression and equal-protection arguments had been presented to the state court, it might have been construed the statute in a different manner. Accordingly, the judgment of the District Court is vacated, and this cause is remanded to it with directions to retain jurisdiction until efforts to obtain an appropriate adjudication in the state courts have been exhausted."

It is worth noting that in June 1957 a three-judge United States District Court sitting in the Eastern District of North Carolina in *Lassiter v. Taylor*, 152 F. Supp., 295, had before it a case attacking the constitutionality of a statute of the state prescribing a literacy test for voters. The Court said:

> "The only question in the case is whether the Act of March 29, 1957, should be declared void and its enforcement against plaintiffs enjoined by the court on the ground that it is violative of their rights under the Federal Constitution."

The Court then proceeded on *page 298*:

> "Before we take any action with respect to the Act of March 27, (sic) 1957, however, we think that it should be interpreted by the Supreme Court of North Carolina in the light of the provisions of the State Constitution. Government and Civic Employees Organizing Committee, etc. v. S. F. Windsor, 77 S. Ct. 838." (353 U. S. 364)

The opinion was *per curiam* but significantly the distinguished jurist who wrote the dissenting opinion in *Bryan v. Austin*, supra, and who sat on the Court in *Baskin v. Brown*, was a member of that Court. It should be recalled at this point that *Government Employees v. Windsor* was decided the previous month.

Inferentially at least, it would appear that the author of the dissenting opinion upon which the majority rests its decision has revised his views since that opinion was filed and has accepted the views reflected in the earlier cases of *Doby* v. *Brown*, infra, and *Hood* v. *Board of Trustees*, infra, and the later cases of *Government Employees* v. *Windsor*, supra, and *Lassiter* v. *Taylor*, supra. Attention is called to *Hudson* v. *American Oil Company* (E. D. Va.), now before the Court of Appeals for the Fourth Circuit, in which decision has been deferred pending a pronouncement by the Supreme Court of Appeals of Virginia of a question involving an easement in connection with which the state court has not yet announced the policy of the state.

The concurring opinion of Mr. Justice Frankfurter in *Great Lakes* v. *Huffman*, supra, contains an informative review of the legislative history of the statutes opening the inferior Federal Courts to claims arising under state statutes founded on rights under the Constitution and laws of the United States. Prior to 1875 such claims were pursued in the state courts exclusively and brought to the Supreme Court for review of the Federal question. Upon numerous occasions since 1875, Congress has placed restrictions around interference with state actions by the lower Federal Courts and in 1910 an act was passed placing jurisdiction to restrain action of state officials in a District Court consisting of three judges, with the right of appeal directly to the Supreme Court. Not satisfied with this safeguard, additional limitations have been placed upon inferior courts where the action involves matters affecting state laws. In addition to that discussion, attention is called to the action of Congress as late as 1948, when it enacted Title 28, Section 2254, United States Code, spelling out in detail a prohibition against Federal action on applications for writs of habeas corpus affecting petitioners in custody pursuant to judgment of state courts until remedies available in courts of the state have been exhausted.

In 1938, the Supreme Court decided the landmark case of *Erie* v. *Thompkins*, 304 U. S. 64, in which it recognized

that there had been an invasion of rights reserved by the Constitution to the states and proceeded to correct the error. The case is not in point here except as casting light on the recognition by the Supreme Court of the limited jurisdiction of Federal Courts and it emphasizes the "delicate balance" so often mentioned. The discussion of Mr. Justice Frankfurter in *Alabama* v. *Southern*, supra, is also illuminating. As will be seen from that opinion he interpreted the majority opinion there as laying down a fixed rule that in all such cases action by the state court is a prerequisite to interference by the Federal Court. If his interpretation of Alabama is correct, and it has been followed rather consistently, there is no occasion for further congressional action upon this point as suggested by the majority of this Court. This demonstrates the fallacy of the somewhat disturbing assumption of the majority opinion that unless jurisdiction has been restricted by Congress or the Supreme Court, the inferior United States courts are free to assume unlimited jurisdiction.

In *Douglas* v. *Jeannette*, 319 U. S. 157, and a number of similar cases, a somewhat stricter rule against jurisdiction of the Federal Courts appears to have been recognized as applicable to statutes imposing criminal sanctions such as are here involved. However, I prefer to rest my conclusions upon the broad, general rule announced in the case before cited and discussed without limiting consideration of the question to a special type of litigation. The underlying principle is the same whether the case involves a civil suit for the collection of a tax or the enforcement of a statute denouncing specified conduct as a crime. Both involve the police power and both involve the delicate balance which prevails between sovereign powers.

The cases last cited and quoted from should be sufficient to show with certainty the proper course to be followed by this Court. However, those cases by no means include all in point and, as earlier indicated, the problem here is to limit this discussion to avoid becoming burdensome with a discussion of cumulative authority. Some of the cases in

which the doctrine is announced with equal emphasis and apt language are listed in the footnote.[3] An examination of these cases discloses that upon numerous occasions the lower courts have undertaken to pass upon the constitutional validity of state statutes only to be reversed by the Supreme Court without consideration by it of the constitutional question, with directions that the lower court await an interpretation of the statutes by the courts of the state affected, e.g. *Railroad* v. *Pullman; Great Lakes* v. *Huffman; Alabama* v. *Southern; Government Employees* v. *Windsor.* There are many other cases which might be cited and discussed. These cases which have announced the law clearly, are not being followed by the majority. They have not been distinguished and only a negligible number have been cited. The majority have elected to base their decision upon authority for which the most that can be said is that

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[3] *Matthews* v. *Rogers*, 284 U. S. 521, 525-526 (1932); *Great Lakes* v. *Huffman*, 319 U. S. 293, 296-301 (1943); *Meredith* v. *Winter Haven*, 320 U. S. 228, 232 (1943); *Federation of Labor* v. *McAdory*, 325 U. S. 450 (1945); *A. F. of L.* v. *Watson*, 327 U. S. 582, 600 (1946); *Rescue Army* v. *Municipal Court*, 331 U. S. 549 (1947); *Shipman* v. *DuPre*, 339 U. S. 321 (1950); *Stefanelli* v. *Minard*, 342 U. S. 117, 120-123 (1951); *Albertson* v. *Millard*, 345 U. S. 242 (1953); *Doud* v. *Hodge*, 350 U. S. 485 (1956); *Beasley* v. *Texas & Pacific*, 191 U. S. 492; *Cavanaugh* v. *Looney*, 248 U. S. 453, 457; *Fenner* v. *Boykin*, 271 U. S. 240; *Gilchrist* v. *Interborough*, 279 U. S. 159; *Hawks* v. *Hamill*, 288 U. S. 52, 61; *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334; *U. S.* v. *Dern*, 289 U. S. 352; *Glenn* v. *Field Packing Co.*, 290 U. S. 177; *Lee* v. *Bickell*, 292 U. S. 415; *Penn* v. *Williams*, 294 U. S. 176; *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89; *Di Giovanni* v. *Camden*, 296 U. S. 64, 73; *Beal* v. *Missouri*, 312 U. S. 45; *City of Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168; *Burford* v. *Sun Oil Co.*, 319 U. S. 315; *Eccles* v. *Peoples*, 333 U. S. 426, 431.

Among cases from lower courts peculiarly applicable are: *Lassiter* v. *Taylor*, 152 Fed. Supp. 295, 298; *Doby* v. *Brown*, 232 Fed. (2d) 504; *Hood* v. *Board of Trustees*, 232 Fed. (2d) 626.

For further collection of authorities see: *Tribune Review Publishing Co.* v. *Thomas*, 120 Fed. Supp. 362, 372, and discussion in *Meredith* v. *Winter Haven*, *supra*.

it is of a negative character and upon a "prophecy of foreshadowing 'trends'." This method of judicial interpretation based upon prophecy was commented upon and rejected by the Supreme Court in *Spector*.

THE CONSTRUCTION OF THE STATUTES

This brings us to a consideration of the questioned statutes.

As far as pertinent here, *Chapters 31 and 32* deal with the authority of the state in the exercise of the police power to pass laws regulating the conduct of corporations operating within the state. Regulatory statutes of this nature are fully recognized and any number might be called to mind. *Bryant* v. *Zimmerman*, 278 U. S. 63, appears to be the leading case applicable here. There was involved a statute requiring the disclosure of names of members of certain organizations. Petitioner was a member of the Ku Klux Klan, an organization to which the statute was applicable. For failing to comply with the provisions of the statute petitioner was held in custody by the state authorities. Upon denial of a writ of habeas corpus by the state court he appealed to the Supreme Court of the United States. Justice McReynolds was of opinion the case should be dismissed for lack of jurisdiction without any consideration of the merits. The majority of the Court held that the case was of such nature that it had jurisdiction, but recognized the power of the state to enforce the statute saying that the rights of petitioner must yield to the rightful exertion of the police power. The petition was denied.

It has been suggested that the statute was sustained because of the nature of the activities of the Ku Klux Klan. It is true that the Court referred to such activities when discussing the exception of certain other organizations from the operation of the statute but I do not understand the language of the Court as holding that this was a decisive factor.

Another significant case is *Thomas* v. *Collins*, 323 U. S. 516. That case involved a Texas statute which required paid labor organizers to register with the Secretary of State and obtain an organizer's card before soliciting members within the state. An injunction was issued restraining the petitioner from violating the statute. Subsequently he was held guilty of contempt for violating the order. Habeas corpus was denied by the Supreme Court of Texas. On appeal, the Supreme Court of the United States reversed the judgment of conviction. However, at *page 540* the Court said:

> "We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment.
>
> "*Once the speaker goes further*, however, and engages in conduct which amounts to more than the right of free discussion comprehends, *as when he undertakes the collection of funds or securing subscriptions*, he enters a realm where a reasonable registration or identification requirement may be imposed. In that context such solicitation would be quite different from the solicitation involved here. It would be free speech plus conduct akin to the activities which were present, and which it was said the state might regulate in *Schneider* v. *State*, supra, and *Cantwell* v. *Connecticut*, supra. That, however, must be done, and the restriction applied, in such a manner as not to intrude upon the rights of free speech and free assembly. In this case the separation was not maintained." (Emphasis supplied.)

See also the concurring opinion of Mr. Justice Jackson. Cf. *Douglas* v. *Jeannette*, *supra*.

In a dissenting opinion, concurred in by Chief Justice Stone and Justice Frankfurter, beginning at *page 548*, Justice Roberts said:

> "The right to express thoughts freely and to disseminate ideas fully is secured by the Constitution

> as basic to the conception of our Government. A long series of cases has applied these fundamental rights in a great variety of circumstances. Not until today, however, has it been questioned that there was any clash between this right to think one's thoughts and to express them and the right of people to be protected in their dealings with those who hold themselves out in some professional capacity by requiring registration of those who profess to pursue such callings."

While the statutes impose the duty to register and furnish information concerning names of persons engaged in the solicitation of and contribution to funds for certain purposes, it does not prohibit the solicitation or expenditures of funds provided registration is had and the required information filed. We are not called upon at this time to determine whether the statutes are constitutional or unconstitutional. That is for the state court. Should it be proper to follow the reasoning of the majority the Court would be called upon to determine whether they are so plainly unconstitutional that by no interpretation could they be held constitutional. I have found no case under which it can be said they are so plainly in violation of the Constitution that by no interpretation can they be held otherwise.

The remaining statutes, *Chapters 33, 35 and 36*, dealing with the practice of law, are based in part upon the canons of ethics recognized by the American Bar Association, and in part are declaratory of common law offenses.

The statutes are lengthy and the language employed is involved. A consideration of key words found with relation to other general language is necessary to determine the meaning.

*Chapter 33*, as applied to attorneys, revolves around the phrase "improper solicitation". As applied to a "runner" or "capper" the act denounced is acting as an agent for an attorney, etc.

*Chapter 35* denounces as an offense the instigating or attempting to instigate a person or persons to institute a suit. The statutory definition of "instigating" is somewhat ambiguous and will require a judicial interpretation.

In *Chapter 36* the significant language to be construed relates to *inducing* one to act and the giving of advice by one whose professional advice has not been sought, in accordance with the canons of legal ethics.

It clearly appears that the language employed must be construed as applied to the facts involved. Upon such construction will depend the decision of whether the statutes apply to the activities of the plaintiffs and the members of the bar employed by them.

It is difficult to understand how the majority reached its conclusion that *Chapters 31, 32 and 35* are clearly in violation of the Constitution but *Chapters 33 and 36* will require an interpretation. If this Court determines that it should hold *Chapters 31, 32 and 35* invalid, why should it not declare *Chapters 33 and 36* valid instead of referring them to the state court for interpretation?

At the hearing certain officers of the plaintiff corporations testified. Upon that testimony the majority has incorporated in its opinion a statement of the activities of the corporations with relation to the institution of litigation to which they are not parties. Assuming that statement to be correct it is questionable that *Chapters 33, 35 or 36* would be applicable to those engaged in such activities. I express no opinion upon this beyond observing that obviously a question would be involved. Certain it is that in reaching an answer to that question it will be necessary that the meaning of the statutes be construed.

Plaintiffs complain that the statutes are directed at them. Whether this be true or not is immaterial. The evidence shows there are other organizations engaged in counter activities in Virginia. However, this facts merits only passing reference. As pointed out in *Bryant* v. *Zimmerman*, supra, the constitutional validity of a statute

is not affected by the failure of the Legislature to pass laws covering all cases it might reach or covering the whole field of possible abuse.

I expressly refrain from expressing an opinion concerning the constitutional validity of the statutes. As applied by the courts they might be held valid, they might be found invalid or they might be held valid in part and invalid in part. The point here is that they should be construed by the courts of the State in which their enforcement will take place. Then and only then can the Federal courts properly inquire as to their invasion of rights guaranteed by the Constitution of the United States. To do otherwise would be both to dismiss the obviously questionable language used in places in the statutes and to disregard firmly established principles of construction long accepted by the Federal Courts as applicable in like situations. In this case the Court should observe the "Doctrine of Abstention" referred to by the District Court in *Government Employees* v. *Windsor*, 116 Fed. Supp. 354, at page 358. To do otherwise is to disregard established principles and to undertake to chart a new course of judicial construction with the hope of successfully prophesying "foreshadowing trends" of judicial action. Failure of the lower court to respect the doctrine of *stare decisis* leads to confusion. Failure to do so in this case disturbs the balance between state and Federal jurisdiction.

CONCLUSIONS

1. (a) The Federal Court has jurisdiction under the *Diversity Statute*.

(b) The plaintiffs being corporations are not entitled to the privileges and immunities of natural persons secured by the *Fourteenth Amendment*.

2. This Court may not inquire into the motives of the members of the General Assembly actuating them in pass-

ing the statutes but may consider legislative history when determining the meaning of statutes being construed.

3. While it is my view that the suits are premature, the fact that jurisdiction exists under the *Diversity Statute* coupled with the language of the Supreme Court in *Doud* v. *Hodge*, and some of the other cases considered, the proper course is to retain the case on the docket of this Court and continue them generally until the Acts have been given a definitive construction by the Courts of Virginia before the Federal Court undertakes to test their validity measured by the Federal Constitution.

/s/ STERLING HUTCHESON,
*United States District Judge.*